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Liberty in England:

Its Past, Present and Future Prospects

By Sean Gabb

PhD by Published Works

**Middlesex University
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Liberty in England:

Its Past, Present and Future Prospects

By Sean Gabb

Context Statement

Introduction

The works here submitted were published at various times between 1988 and 1998. All except two were published by the Libertarian Alliance, either directly or in its quarterly journal, *Free Life*.

The Libertarian Alliance is a think tank committed to the defence of free markets and civil and political liberties. Though dating under its present name from the 1970s, the Libertarian Alliance can claim, by way of personal membership and of ideological heritage, a line of descent from the Liberty and Property Defence League, established in 1882. It publishes reports on a wide range of subjects by a wide range of authors - both Enoch Powell and Tony Benn are among other published authors, as are Antony Flew, John Gray, and Edward Pearce.

One of the two other pieces (**Chapter Eleven**) was published by the Freedom Organisation for the Right to Enjoy Smoking Tobacco (FOREST). This is a movement established in 1979 to defend the rights of smokers against paternalist legislation. The other piece (**Chapter Ten**) was

published by the Adam Smith Institute. Established in 1978, this organisation was partly responsible for devising and explaining the Thatcher reforms of the 1980s. More recently, it has been active in consultancy work in Eastern Europe and in the Third World. It has also maintained close links during the past decade with what is now known as the Blairite wing of the Labour Party, publishing reports on welfare reform by Frank Field who is now the Minister responsible for this area of activity.

All three organisations insist on the same standards of scholarship as any academic journal; and are held in high regard by academics and politicians across the political spectrum. Their reports are collected by university libraries and are included in university reading lists.

My own works for these organisations deal with various issues. Sometimes, they are concerned with current issues (**Chapters Two, Five, Six, Seven**, etc), and sometimes with issues of more timeless importance (**Chapters One and Eleven**). But taken together, all constitute an analysis of the English classical liberal tradition. All do consistently address a number of themes. These are: the meaning of classical liberalism, its emergence and its decline, and the possibility of its revival.

One: The Meaning of Liberalism

Terminology is one of the problems of political theory. The basic terms of political taxonomy - conservative, liberal, socialist, fascist - have no fixed meaning. They have been endlessly redefined - sometimes by enemies, sometimes by ignorance, sometimes by simple fraud. It is possible for two writers to describe their opinions by a common name, yet for those opinions to have nothing else in common. In the present case, the confusion has been magnified by shifts over time in the terminology that I use without any change in the opinions being described. I use the words “liberal”, “classical liberal”, and “libertarian” interchangeably. There is good authority for claiming that these words all have the same meaning. However, for the avoidance of ambiguity, I will define my terms as carefully as I can.

When I describe myself as a liberal, or a classical liberal, or a libertarian - and I will from now

on in this Context Statement use the word “liberal” - I mean that I believe individuals to be happier, and the society in which they live to be more successful in common sense terms, when they are left so far as possible to their own choices. How they earn and spend their money, how they associate with each other, how they choose to act in their private lives - these matters are for individuals to decide. That in some cases individuals will choose wrongly in the eyes of other people - even that in some cases they will choose wrongly as those individuals themselves might eventually confess - is no warrant of any kind for coercive intervention (**Chapter One, p.8; Chapter Eleven, p.235-36**). When someone else appears to be making foolish or even deadly choices, we may seek to persuade. We may implore. We may threaten to exclude that person from our company, and to advise others to do likewise. But that is the limit of our rights to intervene. As John Stuart Mill so famously stated (quoted, **Chapter One, p.58; Chapter Four, p.88**), “Over himself, over his own body and mind, the individual is sovereign”.

Now, this is not a formulaic guide to policy. There are others who stand in much the same tradition as I do and who believe that all questions of policy can be settled by deducing which rights follow from first principles. Should there be immigration control? they ask. No, they answer, because our right to do with ourselves as we please includes the right to buy or rent property where we please and then to live there. So far as we may be prevented from going where we will, we are coerced, and coercion is always wrong. There is no conception of the likely effects of throwing open the borders and allowing fifty million Bangladeshis to come and live in Bradford. If this matter is considered, it is either to be dismissed as unlikely to happen, or as a benefit to all concerned - both manifestly dubious claims.

My own conception of liberalism is very different. There are certain fixed principles, but no policy guidance can be directly deduced from them. Once these principals are stated, we need to ask the subsidiary question, of what should be considered to affect individuals alone, and of what to affect others. We can answer by saying that people should be left alone unless their actions involve the use of fraud or force against others, or unless they threaten the achievement of some legitimate common good. And this is clearly not a formula. It is not something into which a question of policy may be fed and from which an answer may be extracted. Any such question requires the closest examination. It requires an understanding of law, economics, sociology, history, and every other branch of moral philosophy, before any answer can be given

to a question about what individual actions should or should not be controlled. Even among liberals who understand these disciplines equally well, there is room for disagreement.

It is not a formula, but neither is it a cover for pragmatism of the sort that some Conservative politicians think the height of wisdom and mistakenly ascribe to Edmund Burke. Principles are neither to be applied rigidly even where catastrophe may be the result, nor to be scorned as “sterile dogma”. Instead, they are to be seen as what the lawyers call “rebuttable presumptions”. These are beliefs about matters of fact that a court will hold until they are disproved by submission of evidence to the contrary. Thus, if asked to investigate whether a state monopoly of the internal mails is justified, we begin with a presumption against such monopolies and see if there is any positive justification. If there is none, or it is not very strong, we simply confirm our starting presumption.

Moreover, because arguments for privilege or control are often very sophisticated and hard or expensive to disprove (**Chapter One, pp.48-57**), the standard of proof employed must be the criminal one rather than the civil. Instead of settling arguments for intervention on the balance of probabilities, we need to insist on proof beyond reasonable doubt. To do otherwise is to give oneself, bound hand and foot, over to the special interest groups.

Once this approach is understood, it is possible to accept that the application of liberal principle must always be contingent on circumstances. It may lead one occasionally astray, but is unlikely to result in a general drifting away from the actual principles. There are whole categories of interventions that should not normally be made by the authorities. Even so, on the showing of adequate proof, there is no presumption against state action that may not be overcome.

Most obviously, there is taxation for national defence. All taxes involve the threat of violence. Money is taken from individuals in circumstances where they would almost certainly not give of their own accord, and it is spent on things that individuals would almost certainly not purchase in a free market. Frequently, the items of expenditure are the means of further limitations on freedom. But that is no argument in itself against taxation. There may come a time when all public goods will be bought and sold by voluntary exchange. But that is not possible at the moment. The only way for the country to be defended against foreign attack is for there to be a

State, which is to have the right to compel payment for the upkeep of its armed forces.

This does not legitimise armed aggression, or the involvement of the State in other wars fought for any purpose beyond national defence as reasonably conceived (**Chapter Eleven, p.233**). I am, for example, opposed to the sending of British forces to Bosnia and Kuwait. Terrible things may be happening, or have happened, in these places. But there is no threat there to the survival or even to the well-being of this country; and so British tax money should not be spent, nor British lives be endangered, in these places. This being said, national defence is a proper reason for state coercion of individuals.

Moving away from national survival, which is not really a controversial point within liberalism, we come to the whole issue of what is a “legitimate public good”. This is controversial. It is very difficult to lay down precise rules here, as all depends on circumstances. However, to lay down a general rule, it is legitimate to provide by coercive action those things that a) are necessary for the achievement or maintenance of a more pleasant social life; *and* that b) cannot be obtained by voluntary actions; *and* that c) are not incompatible with the survival of other freedoms. In all cases, it must be repeated, the presumption is against state action. But assuming the evidence is beyond reasonable doubt, the presumption may be set aside. To see how this principle might be applied, let us look at the example of freedom of speech.

Now, this is perhaps the most important specific right in liberal ideology. It is valuable in itself. It is vital for the maintenance of every other right. Following John Stuart Mill, we have no means of knowing with complete certainty the truth or falsity of any proposition. Therefore, to prohibit its being advanced is to make a wholly unfounded assumption of infallibility. Moreover, if a prohibition is made, one of two consequences will follow:

First, if the proposition is true, humanity will lose whatever benefit might follow from an addition to the stock of existing truths;

Second, if it is false, we shall lose what little assurance we can have of the truth of the other proposition denied by it. As the late Karl Popper argued, propositions are to be accepted as valid so far as they have not so far been refuted. Establish even the plainest truth by law, and it will

dwindle from the status of a truth acknowledged by reason to the status of a prejudice that can be embarrassed by the feeblest opposing show of reason.

This is an argument of immense power. Nevertheless, there are grounds on which freedom of speech may be restricted in the public interest. These are discussed in my pamphlet advocating a European Bill of Rights (**Chapter Ten, pp.191-96**). In this, I allow a number of grounds on which speech may legitimately be restricted.

There are, for example, the basic rules of *sub judice*. While a criminal matter is before the courts, it may not be discussed in public with complete freedom. This is because the case is to be judged in all matters of fact by a Jury composed of ordinary people selected at random. It is necessary for the Jurors to reach their verdict solely on the basis of the evidence presented in court. Ordinary people cannot be presumed to possess the capacity that most lawyers have for putting certain evidence from their minds; and so certain evidence needs to be kept from entering their minds in the first place. Therefore, it is necessary to restrain the publication in the media of any other evidence. There must be no revealing, for example, that the Defendant has been already convicted of any other criminal offence; nor any discussion of alleged claims about the Defendant made by persons who are not to be called to give evidence. The Common Law rules of evidence are very technical, but have been evolved in order to ensure that a Defendant has the fullest chance of being fairly tried for the offences alleged.

It is censorship to prevent a newspaper from revealing that an alleged sex murderer has three convictions for indecent assault; or from revealing that his mother allegedly said on her deathbed that he had confessed his guilt to her. It is an interference with all manner of individual rights when an Editor is fined or sent to prison for printing these revelations. But it is an act of censorship necessary for the securing of other freedoms. Abolish Trial by Jury and replace it with the European system of criminal justice, in which questions of fact and law are decided by professional Judges, and there would be no grounds for censorship. A Judge sitting alone does not really need to be shielded from the wrong sorts of evidence. There would be no valid reason for limiting freedom of speech on matters before the courts. However, Trial by Jury is the most fundamental guarantee of our liberties in this country (**Chapter One, p.25**). There is at least very restricted scope for political intervention in the criminal process when all serious offences must

go before a Jury of the Defendant's peers, who have full discretion to reach any verdict that conscience directs. Throughout English history, Juries have moderated or even stopped political persecutions. They have also nullified bad laws by refusing to convict. To preserve this public blessing, some censorship of opinion is a regrettable necessity.

We might also look at arguments about the protection of public order. There are circumstances in which the publication of certain views - or perhaps their publication in certain forms - might provoke a breach of the peace. It can be argued that, where this can be shown, there is a case for limiting freedom of speech. This is not to endorse "hate crime" laws - where people are not allowed to spread their views on the grounds that these are "offensive" to some minority group. Every new idea upsets someone, and Darwinism might have been banned in Victorian England if the feelings of Biblical fundamentalists had been regarded as solicitously as some feelings now appear to be. Nor is it to endorse controls in every case where a breach of the public order is threatened. After all, if the authorities accepted the likelihood that petrol bombs might be thrown as good reason for stopping a political march, there would be an obvious incentive for intolerant groups to get marches stopped by threatening to throw petrol bombs (**Chapter Ten, p.194**)

All this being said, though, it does seem legitimate to prohibit speech in circumstances where there is a clear and present danger of extreme disorder. So long as the presumption in favour of liberty is observed, the judgement of whether intervention is required does depend on circumstances. Arguments for intervention must always receive hostile examination. As I argue in my work on the rise and fall of English liberalism (**Chapter One, p.51 *et seq***), special pleading has too often persuaded liberals into the acceptance of falsehood. There is also a duty to insist on no more than the minimum level of intervention needed to achieve its stated purpose - to ensure that it is applied without limiting too many other freedoms; and to ensure that it lasts only so long as it is required and no longer. But there is no "one simple principle" to determine the sphere of State action.

There is equal uncertainty when we turn to actions which may harm only other individuals without endangering society in general. Let us examine the prohibition of child pornography. This may appear an easy issue for any liberal. Arguments about the tendency of certain published items to "deprave and corrupt" those viewing them are to be rejected. Some conservatives might

argue that some things are evil in themselves, and that they ought to be prohibited regardless of demonstrated harm to others. A liberal would not agree with this, however. Control is only to be allowed where clear and present harm can be demonstrated to exist. There is no evidence that looking at any sexual display leads to the commission of sexual crimes. Even if there were such evidence, it would not justify censorship. A demagogue who stirs a mob to violence is one thing. He incites offences against life or property at a time when he knows that his listeners are already out of their right minds. He is then using those people as an instrument of his will, rather as if he were pulling the strings of a puppet. A pornographer is something else. His wares are consumed mostly in private. Before anyone gives in to a temptation to go out and repeat the acts shown, there is always time for reflection; and there must always be preparation. In this case, responsibility for whatever crime might result is absolutely with the perpetrator. In legal terms, his own thought processes are a "new intervening cause" that prevents the ascription of responsibility to the pornographer.

This is easy. It seems just as easy to make an exception to the rule of freedom of speech where children are concerned. The restriction is not to protect the viewer from depravity and corruption, but to protect the object of attention. In my analysis of the Criminal Justice and Public Order Act 1994 (**Chapter Three, pp.83-86**), I argue that controls on the distribution of such material are justified for the legitimate protection of individuals. Children are a special category of individuals. They do not have either the intellectual capacity or the experience for there to be the normal presumption in favour of liberty. I do not accept the argument that sexual activity in itself is harmful to children. The British age of consent is a product of our own historical circumstances. It has been lower at other times, and it is presently lower in other places. Until the Criminal Law Amendment Act 1885 raised it to 16, the Common Law age of consent for girls was 12. In France at the moment, it is 15. Indeed, since I last wrote on the issue (1994), the age of consent for homosexual activity has been reduced from 21 to 18, and is about to be lowered again to 16. Far below these ages, there is no automatic reason to believe that sexual activity is harmful in the sense that coalmining or gambling is.

Taking part in pornographic displays is harmful to children is because it is seen as a degrading act by others; and few adults are willing to earn even quite large amounts of money from being portrayed in sexual acts because of the moral turpitude that they would also earn. Then there is

the separate matter of contagious diseases. These can be difficult or even impossible to cure; and in the case of aids, death can result. It is unlikely that most children will know this, or be able to appreciate the risk if told about it. And so the use of children in pornography should be prohibited in order to save them from unwittingly damaging their reputations, and to protect their health. There is no need to appeal to arguments about a tendency of such pornography to deprave or corrupt the consumers of it - arguments that that I have already said a liberal would reject. It is not the product itself that is objectionable, but the means of its production.

The problem for liberals emerges, however, when we turn from production to distribution of child pornography. I took it for granted in my article that distribution was part of the offence, and that the law could legitimately prohibit both. But in a letter published in the next issue of *Free Life* - the journal in which my article appeared - Dr T.J. Eckleburg found holes in my reasoning.

I had assumed that the child pornography to be banned from distribution had been produced in this country. Dr Eckleburg pointed out that most of it is produced outside the United Kingdom - mostly in Latin America and South East Asia. This being so, prohibition would not save child models from being pitied or despised. In their own countries, there might not be the same moral standards as in Britain. Even otherwise, the pity or contempt of the British public would mean nothing to objects living thousands of miles away. On this argument, prohibition was unnecessary.

More important, though, it would advance a principle with much wider application than the one intended. If the sale within the United Kingdom of child pornography produced abroad was to be prohibited, so too ought the sale of Colombian coal, which is often dug by children who are harmed thereby. So too ought the vast range of things made in India with indentured child labour. After all, prohibition is not to follow from the nature of the product, but from the means of its production. And this principle being established, the manufacturing interests would begin an unanswerable clamour for protection against imports from the Third World. What a time they would have if they could advance their own interests under cover of a principle accepted for other purposes by the very liberals whose economic arguments stood in their way!

This would not be the first time that liberals had misled themselves into supporting arguments dangerous to their own central principles. It happened repeatedly in Victorian England with matters like state education and health and sanitary regulations (**Chapter Ten, pp.51-56**). That is on the assumption that Dr Eckleburg's criticisms are just. I have yet to decide. Nevertheless, we have here a valid example of a difference of opinion between liberals over the policy implications of liberalism. To repeat, the ideology is not one of rigid formulæ that exclude the necessity for careful thought on practical issues.

Two: The Rise and Fall of Liberal England

In my pamphlet on the rise and fall of English liberty (**Chapter One**) I deal with a question that has occupied my thoughts since the late 1970s. How is it that a nation in which freedom had for so long existed, and where its fruits had been so long in evidence, could have turned into an increasingly despotic social democracy?

My provisional answer is that the defence of English liberty between about 1640 and 1870 had almost nothing to do with English liberal ideology. It derived instead from an extreme conservatism. The leading "men of speculation", as Burke called them, were less interested in promoting an abstract set of "Lockean" rights than in preserving the inherited rights of Englishmen. The defenders of the Common Law in Stuart England had no regard for - and probably no understanding of - freedom as a coherent right to life, liberty and property. Instead, there were endlessly pedantic defences of the Statute of Winchester and *Magna Carta*. The most basic premise of the Common Law argument was even absurd, and became demonstrably so as the seventeenth century proceeded. It was believed that the English Constitution had always been as it was now, and that Edward the Confessor had ruled an England institutionally identical to the one that James I and Charles I ruled (**Chapter One, pp.9-12**).

But absurd as the premise was, it was held with stubborn determination; and it was used to justify resistance to any attempt to mould England into an absolutist monarchy of the sort then emerging in Europe. It even justified rebellion and regicide when the King proved too unintelligent to realise the limits of his power under the ancient Constitution as this was conceived by his

subjects.

Moreover, though Charles II was restored to the throne in 1660, the whole scheme of government over which his father and grandfather had presided remained destroyed. The Tudors and Stuarts had given England a credible administration. It was never as powerful as in France or in the Habsburg Empire. But it was an instrument that allowed the central Government to impose its authority on the whole country. There was Star Chamber, to ensure that the administration of justice remained favourable to the authorities. There was the Ecclesiastical Commission, to ensure the obedience of the Church. There were various local Councils - in Wales and the North, for example - to transmit and enforce commands from the centre. In 1641, these bodies were abolished. They were unknown to the Common Law, and had been used to usurp its powers, and to reduce its autonomy. Thereafter, it was necessary to rule England by law alone (**Chapter One, pp.20-27**).

This was the true cause of English liberty. The men who drew up the Revolution Settlement in the 1690s were not liberals in the Lockean sense. But they did have an instinctive hatred of any administrative discretion, or anything else that challenged the supremacy of the Common Law. While this conservatism was hostile to what most of us would consider desirable reforms - ie, the simplification and humanising of the law, the establishment of full religious toleration, and so forth, it also resisted the growth of a strong centralised power that would have made reforms at the price of the liberties actually enjoyed by Englishmen. All through the seventeenth and eighteenth centuries, there was jealous regard for the Common Law that stopped any attempts at a purely administrative jurisdiction. This ensured a paralysis of government, which in turn became too inefficient and corrupt to be trusted with any task beyond those specified by the existing law.

This Revolution Settlement was challenged from the end of the eighteenth century by writers like Jeremy Bentham, who insisted on the need for a remodelling of law and administration to make it both cheaper and more humane. With their devoted accumulation of facts and exposure of waste and corruption, they managed to undermine the conservative basis of English liberty. For the first time since perhaps the reign of Henry VIII, the whole State was looked at with an eye to reforming it.

The Whigs and Liberals understood the risks inherent in trying to reform an imperfect but undeniably liberal order based on prejudice, and tried to minimise these risks by concealing novelty behind a facade of antiquity. But they did not understand the risks well enough to avoid them. They still managed to undermine the foundations of liberty. Their reforms needed an efficient civil service. Creating one set off a public choice explosion that the most influential liberal writers had not expected, did not recognise, and even did what they could to encourage (**Chapter One, p.48 *et seq.***).

The Victorian liberals could have avoided this. Yes, they did reject the old Common Law arguments that had kept England free for centuries. Yes, they did create an efficient civil service with all the public choice potential thereby entailed. Even so, they had a body of economic philosophy that clearly showed the advantages of leaving private effort alone. They could demonstrate with impressive logic the benefits of international and domestic free trade. Had they applied these insights consistently, they might have been able to contain the monster they had unwittingly created. As it was, they fatally compromised their ideology. To return to the earlier legal analogy, they allowed cases for state intervention to stand on proof made out on the balance of probabilities, rather than made beyond reasonable doubt.

T.B. Macaulay, for example, accepted the case for state planning in the location of railway lines because he thought the country would thereby have gained a more rational network. In this, he was probably right. What he failed to understand, however, was that the results of state planning would not stop with a better railway network. There would also be an argument laid down for the value of state planning that would be ruthlessly pressed by the bureaucrats and special interest groups to push voluntary effort aside in many other areas (**Chapter One, p.54**).

Still worse, perhaps, was their frequent ignorance of whether the facts alleged in favour of state action were true. Like historians ever since, they accepted the claims made in the Parliamentary Reports of their age as incontestably true. In fact, these Reports were put together by administrators, like Edwin Chadwick, who had a vested interest in showing that only state action could achieve the ends that everyone desired. A great mass of evidence - about the effectiveness of private policing and private education for the working classes, and private sanitation, and so forth - was systematically concealed (**Chapter One, p.57**).

By failing to insist on *laissez-faire* in all matters, they allowed collectivism to grow up in a society that never had to repudiate liberalism in words.

Harsh judgements are passed on T.B. Macaulay, J.S. Mill and Walter Bagehot. They thought they were perfecting liberty. In fact, they were helping destroy it. If England is still a reasonably free country, it is because of the residual conservatism of the English people.

A further matter that is not discussed in the essay is the role of company law reform. The Limited Liability Acts permitted the growth after the 1850s of increasingly large and bureaucratic organisations. Other things being equal, this should have assisted in the growth of government, as big business tends to benefit from regulations and taxes high enough to drive smaller competitors out of business. There is scope for more research on this aspect of the decline of liberal England.

Indeed, some preliminary research that I have done indicates that the difficulties that remained in the way to incorporation helped keep England freer in some areas than was the case in other countries. Why, for example, was alcohol prohibited in America but not in Britain? Part of the answer lies in a multitude of cultural and legal attitudes. Part lies, however, in the higher degree of corporatisation of American business. The breweries that were put out of business by the Volstead Act were mostly joint stock companies; and their owners and managers had a limited commitment to them. The breweries threatened by the temperance campaigners in Britain were mostly family companies; and their owners were willing to spend lavishly to keep temperance at bay.

All this, however, is yet to be fully investigated. What I submit here is the basics of a explanation of the rise and fall of English liberty between the sixteenth and twentieth centuries.

Three: The Continuing Decline of Liberalism

The first essay in this section was written in May 1989, on the tenth anniversary of Margaret Thatcher's coming to power (**Chapter Two**). It was based on a series of articles written for

student publications, some going back into the early years of the decade. In turn, it was followed by a long line of other analyses of the illiberal nature of “Thatcherism”.

My argument is that the Thatcher reforms cannot be seen as part of any liberal agenda. Much rather, they were a minimal response to the crises of the 1970s. In that decade, the relative decline of the British economy that had begun in the early 1950s threatened to become an absolute decline. Inflation, which had been relatively high for a long time, now spiralled out of control. Unemployment, which had been creeping up since the late 1950s, now rose to levels last seen before 1940. Profits and investment levels were collapsing. There were strikes and shortages. It seemed at times as if the country was on the verge of some great political upheaval.

The Conservative Government that came to power in 1979 stopped the economic decline. Some regulations were taken off. Some taxes were lowered. Many state enterprises were sold into the private sector. The trade unions were no longer regarded as a tiresome partner in economic management, to be coaxed and nagged into cooperation. They were instead labelled as an enemy and smashed without mercy. By the middle 1980s, the reforms were helping the economy into an impressive recovery. By the late 1990s, they had plainly turned Britain from the “Sick Man of Europe” into one of the most open and dynamic economies in the world.

Obviously, Thatcherism contained a lot of liberal economics. But these were always applied in carefully measured doses. Just enough was done to stop the relative decline. Since most other countries are still social democracies, or are misgoverned on other lines, not very much needed to be done compared with what might have been done. The overall burden of taxes hardly changed during the years of Conservative rule. All that changed were its incidence and mode of collection. As for regulation, this was reduced for big business, but greatly extended for small companies and sole traders. And outside the narrowly economic, there was a retreat from liberalism more pronounced than in any other time of peace in all of modern English history.

The procedural safeguards of the Common Law have in many cases been brushed aside (**Chapters Two and Three**). Retrospective legislation has been made. Trial by Jury has been limited. The right to silence has been abolished. The burden of proof is being progressively reversed in criminal cases, so that innocence rather than guilt needs to be proved in court. Some

punishments can now be imposed without any due process whatever.

Turning to substantive law, we find that there has been the first pre-publication censorship in 300 years in the Video Recordings Act 1984. There has been a great mass of money laundering offences created, which have turned the banking system from a means of transferring payment to a means of surveillance and control (**Chapter Eight**). There has been a general intensifying of the “War on Drugs” - a war that can be seen on liberal grounds as serving no legitimate public interest. Though to a lesser degree, there has also been a general war against free choice. The right to smoke has been attacked with a combination of tax increases, advertising bans, and propaganda financed by the tax payers (**Chapter Eleven**). We have also been comprehensively disarmed, so that our ability to defend our own lives and property has been abolished in favour of our total reliance on the State for protection (**Chapter Five**). In its refusal to enact a clarification of the law regarding consent, the Major Government allowed at least the principle to be restored, that the State may control what adults do sexually with each other in absolute privacy. In 1990, a man was found guilty of “aiding and abetting others to cause injury to himself” (**Chapter Four, p.94**).

Turning from the content of legislation to its mode of enactment, we see that the Thatcher and Major years were illiberal here too. There was progressively less Parliamentary discussion of new laws. Instead, they were made by way of treaty obligations. Much of this tendency was driven by the requirements of European integration - a subject that I do not directly address in the present texts. During the past 25 years of European membership, our Constitution has been subtly amended. Some branches of government have been exalted as never before, others set on their way to extinction. The most obvious beneficiaries have been the administrators, the special interest groups, and the small number of politicians who learn to play the rules of the new system. These have become largely freed from democratic control. The old democratic institutions remain, but are of decreasing significance. They have little real control over the decisions that affect our lives. Either they merely ratify those decisions, or they are not even formally consulted. At every point, this transfer of power is justified by the need to comply with obligations accepted under the various European Treaties.

Let me take what many will think a trivial example. In October 1995, it became a criminal

offence to use English measurements in a wide range of commercial transactions. There was an outcry in the media and to some extent in Parliament, as people were forced to stop using measurements the very names of which are part of our language. The outcry was silenced by the explanation that this had been forced on us by "Europe". A Directive from 1989 was produced which required standard units of measurement throughout the Union.

The explanation was spurious. The Directive did require standardisation, but was silent about the outlawing of other units of measurement, or the use of criminal law to ensure compliance. Indeed, a Directive of the European Union is not a law. It is simply a wish list sent out by the Commission to the member governments, which can be treated very largely as they wish. I am told that in Spain and Italy and Holland, I can still legally buy a gallon of petrol and even a scruple of vitamin C - assuming I can find anyone there willing to deal with me in these units. The forced metrication of this country happened not because Jacques Santer decreed that it be done, but because the relevant officials at the Board of Trade have tidy minds that are offended by the illogicality of the English system of weights and measures. These people used the excuse of Europe to avoid the political reaction that might have frustrated their design had they relied on a law made entirely in this country.

In the case of the money laundering laws - which I do extensively discuss (**Chapters Eight and Nine**) - the corruption of democracy is still more impressive. These appear to have been forced on the British Government by a European Directive made in 1991. The truth is that various Home Office and Treasury officials were looking for new things to regulate in the middle 1980s, at the same time as various City institutions were worrying about losing business as financial deregulation opened their markets to new entrants. There were other interested parties, but these were the important ones. They were powerful enough to lobby the British Government into joining with the Americans to call for a United Nations initiative against money laundering. This led to a Convention, that led to a Council of Europe Directive, that led in turn to a European Union Directive, that led finally to British laws for which no British politician can be blamed - no matter how much harm they do to the City as a whole - and which no democratic majority can overturn without first repudiating a mass of treaty obligations.

In 1989, I wrote that the Thatcher Government had set in place the full coercive apparatus of a

police state. It needed only the right circumstances for that apparatus to be put into use. In 1998, after another nine years of legal changes, I see no reason whatever to amend this judgement.

Back in the 1980s, I was regarded as eccentric by other liberal supporters of the Thatcher Government. One denounced me as a “right-wing *Guardian* reader” when I spoke out at a meeting in 1986 against what was then the Public Order Bill. The prevailing view of events was a kind of economic determinism that the most committed Marxist would have admired. The only thing that mattered, it was believed, was the economic “base”. All else was merely “superstructure”. Let the base be changed with enough privatisation and deregulation and tax cutting, and the matters that I was talking about would be of no importance to the outcome. In 1986, I was told at an Adam Smith Institute function to wait another ten years before passing judgement on the Thatcher project. Even in 1998, I heard a leading member of the Libertarian Alliance declare that the only matter of any importance was the share of national income taken by the State.

As said, even in these matters, the judgement must be hostile. There has been no diminution in the economic power of the State, merely a rearrangement. But considering the claim regardless of the facts, it is as crude a mistake as can be imagined. Markets are a necessary condition for the existence of a free society - but they are not sufficient condition. Certainly, where our economic pursuits are sufficiently regulated or stifled, there can be no liberty in the sense recognised in this Context Statement. On the other hand, political despotism is perfectly compatible with the existence of a market economy. The latter can mitigate the worst effects of the former. Unlike under socialism, disobedience need not be accompanied by starvation. But, looking from the Hellenistic monarchies to the Italian city states of the late Renaissance, to Chile under General Pinochet, or Syria under President Assad, the ability to buy and sell without restraint has never magically created due process in criminal trials, or allowed state actions to be criticised in public without risk.

Moreover, when a government is freed from constitutional restraints, it may be enlightened in economic matters, but need not be. The fashion in economics for the past two or more decades has been to look to markets as the main system of coordination; and governments of virtually all descriptions have hurried to privatise their telephone systems. But let the fashion swing back to

state control, and a government increasingly liberated from constitutional restraint will have no trouble in reversing its policy. Economic freedoms under political despotism are not freedoms at all, but revocable privileges.

Still worse, technological change combined with big and unlimited government may be about to propel us into a strange and frightening new world of surveillance. Though I was nearly alone within the “new right” in making my complaints, there is nothing original in complaining about police powers and the Spanner case. This has kept the “liberal” press busy since 1979. The full evil of what has been happening in the past two decades still lies in the future, fully explored only by a few dystopian science fiction writers. In my writings on identity cards and money laundering (**Chapters Seven, Eight and Nine**), I attempt to look into this future and see what the ultimate effect may be of the Thatcher reforms.

The present moves towards the complete surveillance of financial transactions and the establishment of an identity card system may together bring about the most total despotism that ever existed. We do not need to imagine the sort of abuses that have happened elsewhere in the world - of black people or Jews singled out for discrimination because of their identity cards. We do not need to imagine anything so melodramatic. All we need do is project present trends into the future.

As computing power and prices continue to fall, the number of records held on us will naturally increase. Most of these will be opened for commercial purposes. The supermarket loyalty cards, for example, already give a full picture of what their holders are buying. Credit card records have for years now constituted a pretty full profile of where the holders are going and what they are buying. Libraries are beginning to store data of what books their members are borrowing; and bus companies are experimenting with personalised tickets that allow the holder's whereabouts to be tracked whenever he boards a bus. Otherwise, closed circuit television systems are being predicted within five years that will be able to recognise faces from the unique vein patterns that show through ultra-violet filters on the camera lenses.

These developments have great potential for more effective marketing and customer service and safety. They are in our interests as consumers. The danger is that their development in a country

where the State is restrained by few considerations of privacy or due process will tend to make our lives utterly transparent. It is easy to imagine the excuses that will be given for each of the records discussed above to be made available to the authorities - just imagine the convenience of knowing if a suspect was in Central London at a certain time, and if he bought any paint of the variety that was found at the scene of the crime. Once the information is available, it will be demanded by our big and powerful State.

And here is the despotism. There will be no "boot stamping on a human face - for ever" It will in its outward appearance be gentle and reasonable. It will remain democratic, in the sense of allowing elections to office and the discussion of authorised topics. Its uses of power will be more or less in accord with public opinion. It will be wholly unlike the great despotic empires of our century.

In those empires, surveillance and control could never be total. Known dissidents could be followed round and watched. Informers and secret police could frighten everyone else to some extent. But while whole populations could feel a certain pressure to conform to the wishes of those in authority, it was impossible to enforce conformity in all cases. It would have generated a mountain of paper. Economies, already weakened by socialism, would have been made still weaker by the diversion of labour to accumulating and using this mountain.

But this future despotism will not face such problems. The system that I can dimly see will not collapse under the weight of its own folly. The surveillance state, to which we are fast advancing, will make it easier than ever before to know what people are thinking and doing. And it will be able to impose a moderate but firm pressure on everyone to conform to whatever code of behaviour is thought appropriate. Imposed over several generations, not impeded by the existence of other free countries, and not compromised by the sort of overt tyranny that provokes spiritual where not other resistance, this new despotism will at last produce a new humanity. The difference between people in this and in earlier despotisms will be as the difference between an animal chained and an animal tamed.

Most of us, after all, are quite timid. We do not pick our noses in public, or scratch our bottoms, for fear of how we shall be regarded by the world. To be ashamed, even of nothing very serious,

is a natural, indeed a necessary feeling. But we are now facing a return to the conformity of village life from which our ancestors so gladly escaped. We are looking at a future world in which there will be no privacy, no anonymity, no harmless deception, in which we shall all live as if in a fish tank.

The effect will be an invisible but effective control. The knowledge or prospect of being watched will for most of us be a greater deterrent from whatever may then be classed as sin than a whole mass of legal prohibitions. People will come to realise that safety lies in trying to behave and to think exactly alike. The exposure consequent on doing otherwise will be too awful if vague to contemplate. There will be some exhibitionists, willing - and perhaps happy - to expose their lives to the interested scrutiny of others. But not much is to be thought of a world in which such people have become the only individuals.

Nor is there much to be thought about that world's chances of further progress. During the past 300 years, we have fallen into the habit of believing progress to happen automatically. But it has always depended on individuality. Destroy individuality, and there is an end of progress.

In short, I am saying that the intellectual revival of liberalism - which cannot be denied - has led not to a revival of liberalism in the public domain, but to its further decline. Some of its economic elements have been detached and used to pay for the technology that is taking us still further away from liberalism. I am one of the very few modern liberals making this point. I am perhaps the only one in this country who has made the point at any length. And even now, I am still regarded for the most part as a pessimistic Tory obsessed with the trivia of legal procedure and violations of privacy. Even now, most other liberals seem complacently to assume that things like video cameras on every street corner and identity cards are somehow part of the liberal revival, so long as they are provided under a joint venture that involves the use of private finance.

Four: The Prospects of a Return to Liberty

And so, as the past two decades of liberal revival have been a failure at the level of policy, I will in this section outline another strategy by which our freedom might be recovered. This falls

under the heading of “justifications of liberty”, “methods of arguing for liberty”, and the “medium by which all may be expressed”.

Justifications of Liberty

In order to survive, liberty needs a convincing intellectual justification. It has not been enough to assert, as I do above, that free people do better than unfree. The arguments from utility are all valid, but do not seem to work very well as a restraint on power. The reason probably is that they are often too abstract to be generally and clearly understood. It is too easy to slide exceptions into the general rule, until the rule itself is forgotten.

Far better is a more emotional commitment. Belief in the Common Law and ancient Constitution served this purpose excellently. If somebody suggested changing the way Juries were selected, it was no good to argue that it would lead to gains in efficiency or justice - even if this were a valid argument. The answer would always come back: “Such was never done in the past, and such therefore may not be done now”. It was a simple answer. Anyone could understand appeals to antiquity. No degree of sophistical reasoning could shake it. It meant that accused felons were not allowed legal representation until the 1830s, and that the horrid *peine forte et dure* continued until 1771 (**Chapter One, p.36**). But it was enough to see the Stuarts off and all their despotic innovations.

If liberty is to be reestablished in this country, and maintained thereafter, equally simple and definite arguments are needed now. We can, as do the followers of Ayn Rand and other liberal philosophers, make claims about our natural rights to life, liberty and property. The problem is that these have no satisfactory underpinning. They are too open to sceptical attack (**Chapter Eleven, pp.208-13**). And so I turn to two other possible supports.

The first is to get a Bill of Rights passed that cannot be ignored by the politicians. This has to some extent worked in the United States. The first ten Amendments, made in 1791, compel the authorities to abstain from whole classes of intervention - in the case of the Second Amendment, the politicians have so far even been held from bringing in the gun prohibition that would almost

certainly have otherwise been imposed. The Bill of Rights works by reducing a mass of arguments about the value of freedom to a form of words that over time had acquired almost religious significance. For every one person who thinks freedom of speech and the right to keep and bear arms to be good things, there may be hundreds who passively accept them because they are part of the Constitution. The Americans still have the ancient Constitution that we lost in the nineteenth century.

In 1990, I was engaged to draft one such by the Adam Smith Institute. It was at the time preparing a series called "The Omega Project", in which all the institutions of what was then the European Community would be recast on liberal lines. There would be reforms to the Commission and the Parliament and to things like the Common Agricultural Policy. The whole would be capped with a Bill of Rights, which would entrench freedom throughout Europe. My resulting Bill of Rights, with Introduction and Commentary, was published in November 1990, and was extensively discussed in the media (**Chapter Ten**).

Though even then, I was deeply hostile to the idea of British membership of the actual European Community, I wrote and argued for the Bill of Rights on the grounds that its adoption at the European level would solve a problem at the British level. This problem is Parliamentary sovereignty. Under English law - Scottish *may* be different - there can be no entrenchment of any legislation. Parliament can do anything it pleases, except bind itself for the future. There could be no hope of getting *and keeping* a bill of rights under English law.

My draft was much praised at the time for its clarity and completeness. It has a number of faults that now strike me as obvious. The second most important is that it lacks explicit prohibitions of the civil asset forfeiture that has been used in America to nullify the due process clauses of the Constitution. By relying on an Admiralty Jurisdiction taken from English law, the American authorities have found the means to take property without even the semblance of a trial. It is simply enough for the owner to be suspected of a drug offence. My Bill of Rights would probably stop such acts under Article 1 (**Chapter Ten, p.182**). But an explicit prohibition would close a possible loophole.

The most important fault, however, is that no politician in Europe would ever consent to

something that so utterly constrained their right to act as they pleased. What I drafted would serve rather well as the Bill of Rights of a country in which liberalism was already the dominant ideology. It could not by itself establish the domination of that ideology. And so I turn to the second possible support for liberty, which is the religious.

My pamphlet on the Christian case against the anti-smoking movement (**Chapter Eleven**) does far more than make a case for FOREST. It is also an extended meditation on the relationship between theology and politics. Its conclusion is that liberalism is the ideology most pleasing to God. I argue this as follows:

First, true virtue must be freely chosen. This is both deductively and Scripturally true. For example, when asked by the rich young man how salvation might be gained, Christ replied:

If thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven: and come and follow me. [*Matt. 19:21*]

That is not the same as having the Disciples jump on him and rob him and give all his goods to the poor. It means a voluntary renunciation of wealth. For the virtue of the act lies not in the mere transfer of assets, but in the willingness to make that transfer. When God made us, he made us free to choose. The notion of Divine punishment and reward is otherwise meaningless. Our actions can be good or evil - and therefore capable of punishment or reward - only so far as they are freely chosen.

Second, we can therefore say that the form of society most pleasing to God is one in which its various members are to the fullest extent possible free to choose their own actions. Such freedom, of course, must be consistent with the survival of the society in which we live and act; for virtue and vice have meaning for the most part only so far as we deal with other human beings.

Now, this is in itself an empty formula. To take it up and rush straight into arguments about social and economic policy is to fall into the same error as the preachers of the "Social Gospel". Neither *The Bible* nor deductive theology says anything about the precise shape of God's

preferred social order. There is no guidance to be found in the practice of the Old Testament, as whatever order was established there was under God's direct orders, and applied to a number of Jewish tribes in circumstances utterly different from our own. In any case, the Old Testament has no binding effect on Christians, having been superseded by Word of Jesus Christ. It is worth studying only so far as it prophesies and illuminates that Word. Nor is there anything in the New Testament that directly answers questions of social and economic policy, as the various books were written under the impression - an impression so far shown by experience to have been a misunderstanding - that the world was about to come to an end; and that the questions that we most wish to ask had no need of an answer.

To provide answers of any value, the formula must be used in the light of secular knowledge. This is an entirely legitimate approach. For, while *The Bible* contains the Word of God, it does not contain the whole Word. It does not, for example, tell a carpenter how to make a chair, or contain guidance on the best operating system for a computer. More importantly, even what seems the plain Word can be contradicted by natural evidence. We know now that many passages in the Old Testament regarding the natural sciences are false if taken literally. We know, for example, that the Earth orbits the Sun, and care nothing for the verse in Joshua describing how the Sun was stopped in its path around the Earth to let the Israelites win a battle before the evening. [*Josh. 10:13*] We do not reject the verse as false, but we do reject the interpretation placed on it before Copernicus and Galileo. When therefore we desire to exercise the dominion that God has given us over the Earth and its resources, we look to the natural sciences. This is not blasphemy. For centuries now, it has been held that the laws of science are the laws of God.

The same is true of the social sciences. The laws of these also are the laws of God. They are regularities of conduct allowed by God for the better survival of human society. And, on a candid examination, it will be found that the liberal view of the social sciences is the correct one.

And this makes liberalism part of the Divine Plan for mankind. God desires us to be as free as is compatible with the survival of society. Liberalism is the ideology of freedom, and can be shown to be compatible with such survival; and so is the social and economic extension of Christianity, just as physics and biology and so forth are the scientific extensions.

This allows us to defend Trial by Jury and free trade and freedom of speech not just as contingently good for social well-being, but also as being divinely ordained. Whoever wishes to destroy or limit freedom without legitimate cause is the enemy not just of mankind, but also of God, and shall receive for his efforts damnation.

This is not the only - and may not be the best - emotional support for a free society. But it is a set of arguments that follows properly from its premises, and is offered to the religious as their guide in matters of legislation.

Methods of Arguing for Liberty

This being said, we need a strategy for arguing for liberalism. My second pamphlet on gun control (**Chapter Six**) proposes a strategy of deliberate extremism. Just after the Dunblane Massacre in 1996, I was invited into a Scottish television studio to argue for the right to keep and bear arms for self-defence. I did so very forcefully, and was absolutely shunned by the audience for my pains. No one agreed with me. Even the representative from the Shooters Rights Association, who agreed with me in private, kept his distance from me in the reception afterwards.

I might have concluded from all this that I had failed. Instead, I decided that I had succeeded very well. For the secret of marketing unpopular arguments is to state them as clearly and memorably as possible. This has three advantages:

First, by moving the extremes of debate, we also move the centre of debate. If I argue that income tax is about right at the current level, the middle position will be between me and someone who wants to increase it - thus the middle position will be for a small increase. If, on the other hand, I argue for the abolition of income tax, I might so shift the middle position that most people will decide that a small cut is the best policy to agree. The trick works because most people instinctively believe that middle positions are the safest place in any debate. Extremes, by contrast, have a bad reputation. It is not generally understood that the centre is a function of the extremes; and this is a valuable weapon.

Second, extremism wins converts who are in turn good at spreading ideas. Many religions and political movements have gone far on the commitment of extremists who will tolerate no exception to their general rule, but carry every principle to its logical conclusion. Moreover, even if converts are not directly gained, a clear statement of an outrageous view is easily remembered for others to describe later on. And it is often the case that a scandalised account of an opinion will be passed on to possible converts. Something like this actually happened to me in 1978. Reading *The New Statesman* one day, I came across a sneering reference to “the Austrian fanatic von Hayek”. I at once went off and got his *Constitution of Liberty*. It would have been still better had Mr Foot told me the contents!

Third, extremism establishes a position in the general debate. Regardless of their truth or falsehood, successful doctrines go through a fairly common evolution. First, they are ignored. Then they are ridiculed. Then they are misrepresented and seemingly refuted. Then they are seriously contested. Then they become the consensus. If an idea is to get beyond the first stage, it must be propagated as forcefully as possible. If one person is trying to be heard in a room full of people all talking about something else, he must shout very loud. So it is with extremism.

The need, therefore, is for liberals to be as extreme as they can be every time they have the opportunity to be heard. This is not to advocate the rigid purity that I have already criticised, but is simply stating what is believed as clearly as possible. There is little value in arguing for a capping of welfare expenditure, when the real desire is to abolish it. There is no value in moderation. It is rather like hearing an estate agent say “If you ask £80,000 for this house, you may not find a buyer. Better far to ask £40,000 and try to gazump any buyer upwards sometime before exchange of contracts.” Not only is this dishonest, it is also fanciful. In politics, as in general, the best way to get what you want is to ask for it - or to ask for rather more and then be willing to compromise.

Look at the British socialists who spent half a century of arguing and publishing before 1945. Did they spend that time talking about the need for a National Coal Board and a National Health Service that would leave the consultants free to keep on their private patients? If they had, it is unlikely that the Labour Party would have got anyone into Parliament, let alone won the battle of ideas in the 1930s and 40s. Instead, they spoke about what they really wanted - their “New

Jerusalem” of universal brotherhood and plenty. This is what attracted people of intellectual and organising ability into their movement, and helped beat down an opposition that was right but had almost no one able or willing to say so. The actual institutions set up by the Attlee Government were compromises, and were never intended to last much beyond the next big ratchet to the left in British politics. That these institutions lasted so long is testimony not to their durability, but to the weight of the intellectual pressure behind them even after the 1940s high point of British socialism.

This is not to reject compromise. There will be no full return to liberalism for many years. There must be compromise in the short term, accepting whatever can be had. There is no value in sabotaging a fine compromise for the sake of something that cannot yet be achieved, but may be achievable after a few years of the compromise - see, for example, the opposition of some homosexual groups to lowering the age of consent to 18 rather than 16. But compromise must not be something that is reached as the advocates of moderation wish it to be. To be successful, liberals must get into the habit of saying what we really want, and then settling until the next convenient moment for what we can get.

Medium by Which All May be Expressed

In this final section, I turn to the question of how the liberal message may be propagated. It will not be *via* the established media. This is worthless from the liberal point of view. Liberty of conscience and of unlicensed printing once embodied two principles - that individuals have the right to believe whatever they will, and to communicate this without hindrance. The institutions remain, their principles repudiated. Today, we can read about religion things that might have shocked Voltaire. But the important debates are no longer religious. Where they are important, there are new catechisms and new forms of blasphemy - and a policing of them that, increasingly, any inquisitor might have recognised.

In this country since about 1910, the media has at least distorted the news. Instead of reflecting what people are really thinking, and reporting what the politicians are really doing, it has created a world close enough in appearances to the real one not to cause scandal, but in which nearly all

the substance has been replaced. It may no longer be able to conceal things like the Abdication Crisis, or Churchill's drunken incompetence. But it can still set a false agenda for public debate. It does this by a subtle yet effective framing of arguments, by turns of phrase, by terminology. We have, for example, the continued use of "right" and "left" - a dichotomy that never meant much at its most relevant, and which now describes political debate about as well as the Ptolemaic system described the universe. It is a dichotomy that, so far as the public is concerned, serves to break liberalism into disconnected fragments and to scatter these across the whole conventional spectrum of thought, and so to reduce its effectiveness as the main opposition ideology of our age. Or we have the repeated conflation of greenery with niceness, of coercive altruism with caring, of markets with throat-cutting greed, of anti-nationalism with a love of supra-national institutions like the United Nations and the European Union.

It may seem an absurd exaggeration to say this in a country where no laws exist against propagating any point of view, but the issues are presented by the British media in ways that often prevent their being intelligently discussed. Part of this, no doubt, is due to the idleness and stupidity of most people who get jobs in the media. Part of it, though, is the effect of a centralised media the owners of which have been co-opted into the Establishment.

But the Internet changes all this (**Chapter One, p.62**). The West is moving perceptibly into an age of zero censorship. We are not there yet - not even in America, where the revolution is most advanced. But it is plain where we are heading. The intricate web of laws and informal pressures that governs expression in even the freest countries is being broken through. If we want to publish unorthodox opinions, we no longer need to negotiate with editors, hoping at best for a letter to be published or to be laughed at even while allowed on to a current affairs programme. If we want to read such opinions, we no longer need to hunt down obscure little pamphlets and newsletters. It is increasingly irrelevant whether the media barons are offered bribes or threatened with prison: their ability to manipulate what we read or see or hear is withering almost by the day. If still only in small amounts, everything is now available on the Internet, and can be accessed as easily as looking for a Chinese takeaway in the *Yellow Pages*. And every day, more pages are created on the World Wide Web, and more data flows through the news groups. We are increasingly in a position to know what is happening, and to make our opinions about this directly available to millions of other people.

It is the Internet that imbues the whole liberal project with fresh hope. All else has failed, but the Internet remains. It is the equivalent of the hand printing presses that helped bring down the Stuarts in the 1640s. As with the defenders of liberty then, liberals now may have only to ensure that the message sent via the medium is clear and attractive and recognisably true.

Conclusion

All being said, one must avoid excessive optimism. The overriding theme of this thesis is that liberalism is not inevitable. It emerged in England largely by accident. It was maintained for several centuries by a set of forces that has no precise equivalent in any other nation at any other time. Only its decline can be seen as inevitable - as the temporary supports on which it rested were knocked away, and the course of English history merged again with that of the rest of humanity. In other words, the liberal ascendancy in England before about 1914 may not have been part of any “progress” from status to contract - but rather an aberration that could not and did not last.

After the first text, showing this history, the others variously describe the continuing decline of liberalism and speculate on how it may be revived. The overall conclusion is deeply pessimistic. Perhaps the Internet will almost magically roll back the great counter-Enlightenment of the 20th century. Perhaps it will not.

Though his influence hovers over most of the texts here reproduced, Hayek is not often mentioned. It may be well, therefore to quote him at the end of this context statement:

[W]hen we decide each issue solely on what appear to be its individual merits, we always over-estimate the advantages of central direction. Our choice will regularly appear to be one between a certain known and tangible gain and the mere probability of the prevention of some unknown beneficial action by unknown persons. If the choice between freedom and coercion is thus treated as a matter of expediency, freedom is bound to be sacrificed in almost every instance. As in the particular instance we shall hardly ever know what would be the consequence of allowing people to make their own choice, to make this decision in each instance depend only on the foreseeable particular results must lead to the progressive destruction of freedom. There are probably few restrictions on freedom which could not be justified on the grounds that we do not

know the particular loss they well cause.^a

The 20th century has seen the triumph of expediency. This thesis looks at the means by which it was avoided in the past, and by which it may again be avoided in the 21st century.

Note on Authorship

All the writings mentioned below are my own unassisted work. Those written under a different name are given with the pseudonym in quotation marks.

^a F.A. von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, Routledge and Kegan Paul, London, 1973-79, Volume One, p.57.

Chapter One

How English Liberty was Created by Custom and Accident and Then Destroyed by Liberals² by Sean Gabb 24,816 words

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One: The Question Stated

According to William Winwood Reade, writing in the early 1870s,

placing aside hereditary evils which, on account of vested interests, it is impossible at once to remove, it may fairly be asserted that the government of this country is as nearly perfect as any government can be.³

Now, this is not one of those vague boasts that turn up in the literature of every powerful nation.

² Throughout this work, I will refer sometimes to Britain, but mostly to England. The reason is that I shall be referring mostly to *English* history, not to Scottish, Welsh or Irish, and to *English* modes of thought. Before 1707, there was no constitutional entity known as Britain; and though during the end of the eighteenth century, the modes of thought I am discussing were often most fully and memorably expressed by Scottish and Irish philosophers, these were for the most part joining in an English debate.

Now - April 1998 - when the United Kingdom is plainly on the verge of disintegrating, there seems no point in maintaining the polite fiction that has grown up in the present century of referring to specifically English things as British. For this reason, I only refer to Britain when discussing issues affecting the whole United Kingdom.

³ William Winwood Reade, *The Martyrdom of Man* (1872), Watts & Co., London, 1924, Chapter VI, "Intellect", p.418

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Reade was what may loosely be called a classical liberal - that is, he believed in free markets, in personal freedom, and in the rule of law. He denied that it was either the duty or the ability of government to make people happy, but only to enable the conditions in which they themselves could pursue happiness as they conceived it.⁴

It seems hard on his own grounds to disagree with him. The previous 40 years have been seen as a time of nearly continuous progress towards his state of perfection. The criminal law had been humanised, and the civil law made cheaper and more rational. Central and local government had been cleared of waste and sinecures. The armed forces had been likewise reformed. Religious disabilities had been lifted. Trade protection had been all but abandoned, and other taxes were low and falling: the standard rate of income tax was 3d in the pound in 1872, and was to fall to 2d in 1873 - or from 1.25 per cent to 0.833 per cent.⁵ And the old taxes on publication had been entirely abolished. At the same time, the National Debt was being repaid - down from £846.1m in 1836 to £784.2m in 1872; or, as a share of the growing national income, from 228.67 per cent to just 73.15 per cent.⁶ The Poor Law no longer pauperised the working classes; and these, by the steady rise of incomes and by downward extensions of the franchise, were now being brought within the pale of the Constitution. As Reade said, there was much still to be done. But much had been done. More than any other in the world, the mid-Victorian State could be described, in Carlyle's words as "anarchy plus the constable".

Yet even as it was celebrated, this state of affairs was passing away. Year by year, the authorities were becoming more active - taking an increasing interest in the contractual and other relationships between individuals. By 1884, Herbert Spencer could take it for granted that

⁴ For explicit statements of Reade's liberalism, see:

Human nature cannot be transformed by a *coup d'état*, as the Comlists and Communists imagine. It is a complete delusion to suppose that wealth can be equalised and happiness impartially distributed by any process of law, Act of Parliament, or revolutionary measure.... [A] government can confer few benefits upon a people except by destroying its own laws (*ibid.*, pp.417-18).

⁵ Source: B.R. Mitchell, *Abstract of British Historical Statistics*, Cambridge University Press, Cambridge, 1971, pp.427-29.

⁶ *Ibid.*, pp.336-67, 402.

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[r]egulations have been made in yearly-growing numbers, restraining the citizen in directions where his actions were previously unchecked, and compelling actions where previously he might perform or not as he liked; and at the same time heavier public burdens, chiefly local, have further restricted his freedom, by lessening that portion of his earnings which he can spend as he pleases, and augmenting the portion taken from him to be spent as public agents please.⁷

Perhaps worse from his point of view, much of this was being done by Liberal Governments, and in the name of liberalism. Joseph Chamberlain, for instance, not only called himself a liberal, but was President of the Board of Trade in the second Gladstone Ministry; and he was there making the sort of laws that Spencer abominated - Acts to allow local authorities to supply electric lighting, and to interfere with the running of the merchant marine. He justified this “new” liberalism on clever grounds:

When government was represented only by the authority of the Crown and the views of a particular class, I can understand that it was the first duty of men who valued their freedom to restrict its authority and to limit its expenditure. But all that is changed. Now government is the organized expression of the wishes and the wants of the people and under these circumstances let us cease to regard it with suspicion. Suspicion is the product of an older time, of circumstances which have long since disappeared. Now it is our business to extend its functions and to see in what ways its operations can be usefully enlarged.⁸

As Spencer saw it, however, all this was just an excuse for turning liberalism into a “new form of Toryism”, in which the old protective spirit could take on forms more suited to a democratic age.⁹ He was not alone. In 1882, the Liberty and Property Defence League was founded - a coalition of individualist liberals and conservatives and business interests, drawn together to fight under the motto “Individualism *versus* Socialism”. The contribution of this body to the preservation of English liberty cannot be overestimated. During more than 30 years, it spent

⁷ Herbert Spencer, *The Man versus the State* (1884), The Thinker's Library, No. 78, Watts & Co., London, 1940, “Preface”, p.xi. He was accounted one of the greatest sociologists of his age, and his unmaintained grave in Highgate Cemetery lies about six feet from that of Karl Marx.

⁸ Joseph Chamberlain, speech to the “Eighty” Club [a grouping of Liberal MPs first elected in the 1880 General Election], 28th April 1885; reported in *The Times*, London, 29th April 1885.

⁹ Spencer, *op. cit.*, p.19.

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lavishly on its own campaigns, and coordinated action for others. Though for the next generation it would fight often very successfully, there could be no doubt that it was resisting an immensely more powerful impulse, which it was able at best to hinder.¹⁰

Taking a longer view, E.S.P Haynes felt certain enough in 1916, the middle year of the Great War, to say that

[t]here is no doubt that for the last forty years the whole tendency of British politics has been hostile to individual liberty.... We are no doubt fighting Prussian aggression, but *not necessarily* Prussian ideals of internal government. Indeed the only effect of the war up to now has been to strengthen the hands of Prussian-minded Britons.¹¹

Turning from opinions to facts, there is no doubt that, starting around 1870, the British State began a remarkable and largely continuous expansion. Since the end of the French Wars, Government spending as a percentage of national income had been drifting downwards - from about a third in 1815 to just over 7 per cent in 1870. Thereafter, the fall stopped. There was no significant increase in time of peace until after the naval race with Germany began after 1905,

¹⁰ For a history of the League, see Norbert C. Seldon, *Laissez-Faire on the Defensive: The Story of the Liberty and Property Defence League, 1882-1914*, unpublished PhD thesis, University of Delaware, 1969 - copy in the possession of Chris R. Tame. See also Thomas Mackay (ed.), *A Plea for Liberty: An Argument Against Socialism and Socialistic Legislation* (1891), republished by Liberty Classics, Indianapolis, 1981; and Auberon Herbert, *The Rights and Wrongs of Compulsion by the State and Other Essays*, Liberty Classics, Indianapolis, 1978.

¹¹ E.S.P Haynes, *The Decline of Liberty in England*, Grant Richards Ltd, London, 1916, "Introductory", pp.14-15, 19-20.

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when it rose to 8.49 per cent in 1913.¹² But in an age devoid of large wars, when the national income was briskly increasing, a stable share for public spending allows a considerable expansion of state activity. After the Great War, of course, Government spending went back to the levels of 1815, and eventually far beyond, reaching a peak of 52 per cent in 1972. Since then, it has drifted back down to about 40 per cent, rising and falling in line with conditions in the economy at large.

These figures indicate but do not precisely show the extent of modern control over our lives. It is fair to say that almost nothing we do is beyond state supervision where not control. Our working lives are regulated in ways so various and often overlooked as almost to challenge description. Whether we offer our labour to an employer or our services directly to the public, the terms on which we do so are in perhaps a minority of cases negotiated solely between the contracting parties. Our food is regulated at every point between its creation and arrival on our plates. Our health and fitness have become things managed by the State, with a growing system of punishments for disobeying the experts' advice.¹³ The raising of our children is closely

¹² Public Finance Statistics, United Kingdom, 1855-1938

Year	Gross Govt Spending (£m)	Net National Income at Current Prices (£m)	per cent
1855	69.1	636	10.86
1860	69.6	694	10.03
1865	67.1	822	7.16
1870	67.1	936	7.17
1875	73.0	1113	6.56
1880	81.5	1076	7.57
1885	88.5	1115	7.93
1890	93.4	1385	6.74
1895	105.1	1447	7.26
1900	193.3	1755	11.01
1905	147.0	1776	8.27
1910	167.9	1984	8.46
1913	192.3	2265	8.49
1938	909.3	4671	19.47

Source: *Ibid.*, pp.367-69, 397-99.

¹³ For an authoritative statement of the lifestyle regulators' creed, see Alweyn Smith and Bobbie Jacobson (eds), *The Nation's Health: A Strategy for the 1990s: a Report from an Independent Multidisciplinary Committee Chaired by Professor Alweyn Smith*, King Edward's Hospital Fund for London, London, 1988.

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watched; and there are even calls for procreation to be licensed by the State.¹⁴ Our entertainments are explicitly regulated, and sometimes forbidden, in the interests of our physical and moral well-being. We have a "War on Drugs" - something that, waged by the Chinese State, struck the Victorians as absurd.¹⁵ In fighting that "war", the British State is fast abolishing privacy in financial matters and reversing the burden of proof in criminal cases.¹⁶

By the standards of a classical liberal, most of us now alive were born into a welfare state. All of us now live in a police state. It may not be the sort in which the press is censored and people disappear. But it is the sort in which we stand beneath an absolute and arbitrary power. If that power is often used for benevolent ends - if the more plainly despotic laws are never fully enforced - that is because our masters please to rule us in this way. Give us new masters, or let the present ones please otherwise, and we shall soon discover the basics of how England is now governed.

The question here to be examined is - Why did this happen? How did the England of Reade's day become the England of our day? Is it - as the socialists and social democrats insist - that

¹⁴ See, for example, Judy Jones, "Top doctor urges legal controls on parenthood", *The Observer*, London, 7th August 1994 - report of how Professor Sir Roy Calne argues "that people in Western nations should have to pass a parenting test and gain a reproduction 'licence' before being allowed to have children".

¹⁵ See, for example, T.B. Macaulay (then Secretary of State at War), Speech on the War with China, delivered in the House of Commons on the 7th April 1840:

We may doubt whether it be a wise policy to exclude altogether from any country a drug which is often fatally abused, but which to those who use it rightly is one of the most precious boons vouchsafed by Providence to man, powerful to assuage pain, to soothe irritation, and to restore health.... We have learned from all history, and from our own experience, that revenue cutters, custom-house officers, informers, will never keep out of any country foreign luxuries of small bulk for which consumers are willing to pay high prices...

(*The Miscellaneous Writings and Speeches of Lord Macaulay*, Longmans, Green, and Co., London, 1889, pp.607-08).

¹⁶ For the abolition of financial privacy, see Sean Gabb, *The New Tyranny of Global, European and British State Control of Financial Transactions*, "Legal Notes No.23", The Libertarian Alliance, London, 1995. See also Sean Gabb, review of William C. Gilmore (ed.) *International Efforts to Control Money Laundering* (Cambridge, 1992), and Rowan Bosworth-Davies and Graham Saltmarsh, *Money Laundering: A Practical Guide to the New Legislation* (London, 1994), published in *Free Life*, London, No.23, August 1995.

For the reversal of the burden of proof, see J. Enoch Powell, *The Drug Trafficking Act versus Natural Justice*, "Legal Notes No.2", the Libertarian Alliance, London, 1987. See also Anthony Furlong and Edward Hume, review of the Proceeds of Crime Act 1995, published in *Free Life*, London, No.24, December 1995.

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liberalism was found at last to be a defective ideology, and that the departures of the present century have been on the whole for the best? Or, to take a slightly different point of view, is it that liberalism was only suited to one particular stage of social evolution, now long past? Or was it overcome by bad luck - the drift into power politics that began in 1870 and culminated in the Great War? Or was it overcome by a coalition of special interests? If this last, why did it prove so feeble in the contest?

The question of why liberalism collapsed has been asked endlessly - and it was even being asked before it had collapsed.¹⁷ I have been asking it ever since I became a liberal in my early youth. I cannot claim any complete answer. But the longer I have thought about the question, and read the answers supplied by other people, the more I suspect that there never was any strictly liberal ascendancy in England. Undeniably, there was a *Liberal England*. But its rise and existence until 1914 owed comparatively little to *liberal ideology*. It owed far more to separate, if related circumstances. I suspect also that the great diminution of liberty that has occurred since Reade's day was set in motion by people like him.

Two: The Seventeenth Century Origins of Liberal England

To see this, let us begin by looking at the ideas that shaped and maintained English liberty between the seventeenth and the beginning of the nineteenth centuries. Because it is one of the very few political texts continuously published and read since the seventeenth century, we could go to John Locke's *Second Treatise*, published in 1690. According to paragraph 4,

[t]o understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or

¹⁷ See, for example, Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905), second edition, Macmillan and Co. Limited, London, 1914, Lecture VII, "The Growth of Collectivism".

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depending upon the Will of any other Man.¹⁸

Now, this may be the most extreme liberal statements ever published by a great philosopher. Translated from his own rather abstract terminology, Locke is saying: How we make and dispose of our money, and under what conditions; where we settle and live; what clothes we wear; what information we receive or impart, how and with whom we associate, what things we eat, or drink, or inhale, or otherwise ingest - these, within the limits set by the equal rights of others, are matters solely for us to decide.¹⁹

While his own model of the best government bears a strong and perhaps unnecessary resemblance to an idealised English Constitution of the seventeenth century, Locke is clear that the main, if not the sole, function of government is the protection of life and property. If it goes substantially beyond that function, only on the grounds of convenience can an objection be raised

¹⁸ *An Essay Concerning the True Original, Extent, and End of Government* (1690), Chapter II, paragraph 4 - in Peter Laslett's edition (Cambridge University Press, Cambridge, 1960), p. 287. The italics are original.

¹⁹ As might be expected, there is some controversy regarding just what Locke meant by this "*State of perfect Freedom*". I will not give a lengthy analysis of the *Second Treatise*. I will instead refer the reader to the following:

He that will carefully peruse the history of mankind, and look abroad into the several tribes of men, and with indifferency survey their actions, will be able to satisfy himself that there is scarce that principle of morality to be named, or rule of virtue to be thought on (those only excepted that are absolutely necessary to hold society together, which commonly too are neglected betwixt distinct societies), which is not, somewhere or other, slighted and condemned by the general fashion of whole societies of men, governed by practical opinions and rules of living quite opposite to others.

(John Locke. *Essay Concerning Human Understanding* (also published in 1690), Book I, Chapter ii)

There is no absolute morality. There are those rules "that are absolutely necessary to hold society together". Any that cannot be shown to be necessary may be abolished as restraints on freedom.

Locke is an inconsistent philosopher. The empiricism of his *Essay* not merely conflicts with, but wholly undermines the natural law position adopted in his *Second Treatise*. But tolerance is more a state of mind than an opinion; and it is, I think, legitimate in this case, to quote from the *Essay* to expand on a statement made in the *Second Treatise*.

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to its remodelling or overthrow.²⁰

Yet, for all he may appeal to us, Locke neither conquered the English mind of his day, nor can be taken as spokesman for its liberalism. During the seventeenth and eighteenth centuries, “the rights of Englishmen” was a phrase as much on the lips of politicians as “democracy” is in the twentieth. It pleased the public. But, then as now, there was a difference between lip-service and genuine belief. Nor among those who did believe was there much reason or desire to expand the phrase until it was co-extensive with Locke’s “*State of perfect Freedom*”.

For the most part, the political thinkers of the seventeenth century defined liberty in a far more

²⁰ See, for example:

...*Tyranny is the exercise of Power beyond Right*, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those who are under it, but for his own private separate Advantage. When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservations of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.

(*Second Treatise*, Chap. XVIII, 199 (pp. 416-17))

...*Revolutions happen* not upon every little mismanagement in publick affairs. *Great mistakes* in the ruling part, many wrong and inconvenient Laws, and all the slips of humane frailty will be *born by the People*, without mutiny or murmur. But if a long train of Abuses, Prevarications, and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel, what they lie under, and see, whither they are going; 'tis not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands, which may secure to them the ends for which Government was first erected...

(*ibid.*, Chap. XIX, 225 (p. 433))

Compare this, by the way, with the following:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

(From Thomas Jefferson, *The Declaration of Independence of The United States of America*, 1776)

It is hard not to accept that Jefferson had the text of Locke open before him as he drafted this most powerful of manifestos, or at least had a clear recollection of it in his mind.

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restricted sense than it can be found in the pages of John Locke. We see this in the writings of men like Coke, Davies, Selden, Cotton, Prynne, Pym, Eliot, Hampden, Whitelocke, and Glanvil - all of them lawyers or students of the English Common Law. To them, freedom meant the enjoyment of certain rights inherited from the past. They believed, or maintained, that the English Constitution had continued exactly the same in every age since "time immemorial". Except for a cycle of decay and restoration, nothing was claimed ever to have changed. Immense industry went into the job of proving that every technicality of pleading or of the law of real property known to the courts of James I had descended unchanged from the very beginning of English history - a beginning that the lawyers were unwilling to date.²¹ Torture and Ship Money had been illegal in the reign of Henry II. Edward the Confessor had governed with the advice of a Parliament summoned in the usual way. In the legal submissions made during the Case of Ship Money - *R v Hampden* (1637) - precedents were advanced, and seriously examined, from the reign of King Egbert (827-39).

Some appeal was made to natural or Divine law. But the main grounds of defence were historical. Indeed, they were considered its best grounds; and the lawyers defended them with fanatical zeal. For there was no understanding of prescription as we find it in the writings of Hume and Burke - that long possession should be seen as conferring title, regardless of origins. There are flashes of the later doctrine in the writings of Coke and Davies²²; and a line of descent

²¹ See, for example, *The Country Justice*, a manual of law published in 1661:

The common laws of this realm of England, receiving principally their grounds from the laws of God and nature (which law of nature, as it pertaineth to man, is also called the law of reason), and being for their antiquity those whereby this realm was governed many hundred years before the Conquest.

(quoted, J.W. Gough, *Fundamental Law in English Constitutional History*, Oxford University Press, Oxford, 1958, pp. 140-1).

²² See, for example:

For a Custome taketh a beginning and groweth to perfection in this manner: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*.

(Sir John Davies, *Irish Reports (Les Reports des Cases & Matters en Ley, Resolves & adjudges en les Courts del Roy en Ireland. Collect & digest per Sir John Davies, Chivalier, Attorney del Roy en cest Realm*, written 1612, published 1674, quoted, J.G.A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, Cambridge University Press, Cambridge, 1957, p. 33).

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between all these writers can be drawn through Sir Matthew Hale in the late seventeenth century.²³ But in the early Stuart period, the Constitution was defended on the grounds that it was both immemorial and unchanging. And that is how it had to be. For without a full concept of prescription, the common lawyers accepted that if the Constitution could be shown not to be both immemorial and unchanging, it would be stripped of its legitimacy. They took it as self-evident that a right granted, however anciently, was revokable by its grantor or by his representative.

In particular, they allowed that if William I had governed by right of conquest, then Parliament and the Common Law must have derived from some later royal gift or consent; and that, this being so, neither could have any security in the present. It would be open to Charles I to change or even abolish them at his pleasure. Men grew very frightened when they contemplated the Norman Conquest; and a continuing thread in English thought right into the eighteenth century was the attempt to show that William had ruled not a conqueror, but as the lawful successor of Edmund the Confessor who had just happened to find it necessary to assert his right of succession by force of arms.²⁴

This is a bizarre doctrine, and it is hard now to see how any intelligent person could have accepted it. It was also a doctrine that had only emerged to dominate legal thought in the recent

²³ ...[W]hen by long Succession of Time, the Conquered had either been incorporated with the conquering People, whereby they had worn out the very Marks and Discriminations between the Conquerors and Conquered; and if they continued distinct, yet by a long Prescription, Usage and Custom, the Laws and Rights of the conquered People were in a manner settled, and the long Permission of the Conquerors amounted to a tacite Concession or Capitulation, for the Enjoyment of their Laws and Liberties.

(Sir Matthew Hale, *The History of the Common Laws of England*, written 1676, second edition published 1716, quoted, Pocock, *op. cit.*, p. 179).

²⁴ According to Pocock,

[t]he typical educated Englishman of this age, it seems certain, a vitally important characteristic of the constitution was its antiquity, and to place it to a very remote past was essential in order to secure it in the present.

(*op. cit.*, p. 47)

See also:

Should we allow our laws to have an uncertain Original. I fear that some people would of themselves fix their original from William I, and if that should be taken for granted, I don't know what ill use the Champions of Absolute Monarchy may be inclined to make of such a concession. (*op. cit.*, pp. 119-20)

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past. Not only was the early Tudor period one of quite radical legislative activism - the Crown and Parliament both exercising their right to make changes in the law - but there had then also been a pronounced sense of the Common Law as just a local manifestation of a universal law. Men who had lived through the growth of Royal Councils such as the Court of Star Chamber, staffed by men schooled in the Roman Law, or had seen the Succession repeatedly changed by Act of Parliament and whole churches established and disestablished, could have little sense of immemorial custom. It was only with the political stability and the isolation of English thought that followed the Elizabethan Settlement, that the Common Law began to regain the primacy it had enjoyed in the middle ages. The common lawyers of the early Stuart period were able to advance their claims of rights inherited from the distant past only by forgetting a quite different state of affairs that had existed before the later years of Elizabeth.

Nevertheless, though bizarre and novel, the doctrine was undeniably useful. More by luck than intention, the English people had emerged into the modern period with a Constitution relatively untainted by despotism. Throughout Western Europe in the sixteenth century, the requirements of national defence or aggrandisement had raised up large standing armies under royal control. These had allowed kings to beat down the constitutional checks and balances that had previously been common across the whole region. The Kings of France and Spain had become absolute monarchs, able to tax and order their realms more or less as they pleased.

Only in England had this pressure been absent. Because of its island status, there had been no need of a standing army, and thus no occasion for a fundamental unbalancing of the Constitution. Indeed, the inflation of prices that had accompanied the flood of silver into Europe from the Spanish settlements in South America had even weakened the traditional powers of the Crown. A King was expected to "live on his own" - that is, to pay the normal expenses of government from the customary rents of his estates plus the proceeds of a few *ad valorem* duties granted at the beginning of each reign. With the real proceeds of these revenues in decline, Elizabeth was forced throughout her long reign to an extreme economy that allowed no army whatever in peace, and that was eased in times of emergency only by approaches to Parliament, which had the exclusive right to grant taxes. She might have used her popularity to coax more money out of

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Parliament, but this would have meant allowing it a share of government that no Monarch until William III could be brought to accept.

Yet, by the time James I succeeded to the throne in 1603, various doctrines of divine right and unfettered sovereignty had made their way into English thought. They can be found in the writings of the age.²⁵ All ideas have consequences, and those that promote small and already powerful groups have a tendency to produce the largest consequences. We only need look at the present campaign against the motor car to see this. Most British people have either a car or access to one. They enjoy the pleasure and convenience of motoring. Yet they do no more than grumble at the rising burden of taxes and other restrictions on motoring. They do this because the debate over the motor car has been won by its enemies. So it might have been with the argument over English liberty in the seventeenth century. A clear vision on one side of a Monarchy, exalted and served by a bureaucracy and able to try all the approaches to national greatness then fashionable; and on the other an unfocussed sense of unease as the loss of an ancient but derided Constitution - there would have been no contest. The doctrines then coming in from Europe would have been used to justify the introduction into England of a royal despotism that in Europe they had been devised to justify after the event. To keep these doctrines from having any mark on the Constitution, it was necessary to raise up some countervailing doctrine of limitation.

The rediscovery of the Common Law served this purpose. It allowed a defence of the declared rights of individuals and corporations and the powers of the House of Commons against royal encroachments. It stressed that government should act only by due process. It was even quietly expansive, since many of the rights claimed as ancient were actually modern or not yet existent. See, for example, the arguments during the reigns of James I and Charles I over the rights of the House of Commons: for all the antiquarian zeal of the Parliamentary leaders, much of what they

²⁵ See, for example, Francis Bacon, who served under James I as Lord Chancellor:

Let judges also remember that Salomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty. (*Essays* (second edition, 1612), No. LVI, "Of Judicature" - edition quoted published by Oxford University Press, Oxford, 1911, p. 164)

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were claiming had never been admitted in earlier times, let alone granted and enjoyed.

Yet the conventional test of whether a law was good or bad was not in itself liberal. A modern law could be judged on how well it harmonised with the others; and this in practice applied a liberal test to many Stuart measures. But an old law could be at best only reinterpreted. Otherwise, no matter how illiberal, it was regarded by the defenders of freedom as no less valid than *Magna Carta*.

All this suited the more radical dissenters, who joined their zeal for godliness to the defence of the Ancient Constitution. It allowed quite as much freedom as most of them wanted. Their complaint against the House of Stuart was that it maintained the supremacy of a Church that they abhorred, and that it persecuted them. With very few exceptions, this did not make them into secular libertarians.²⁶ Their own settlements in North America were in many respects as intolerant and conformist as Stuart England. Religious freedom meant for them the right to belong to an approved Dissenting church and to no other. The freedom of these churches from state control meant their right to enter politics and have their own views enacted into law. They hated Roman Catholics, and Anglicans, and pleasure. Their hatred of this last can hardly be conceived. Every pleasure, no matter how modest, that was not immediately joined with the contemplation of God and His Awful Day of Judgment, was to them abominable. They “hated bearbaiting” says Macaulay,

not because it gave pain to the bear, but because it gave pleasure to the spectators.²⁷

For the truth of this epigram, they stand condemned by their own statements. “The more you please yourselves and the world” said one preacher to his flock, “the further you are from pleasing God.... Amity to ourselves is enmity to God.” “Pleasures are most carefully to be

²⁶ For an exception to, and an elaboration on, this statement, see Sean Gabb *Henry Vane, 1613-1662: America's First Revolutionary*, “Libertarian Heritage No.8”, the Libertarian Alliance, London, 1992.

²⁷ Thomas Babbington Macaulay, *History of England from the Accession of James II.* (1848-60) “Everyman” Edition, J.M. Dent and Sons Ltd, London, 1910, volume one, p.129 - or, in any other edition, the eleventh paragraph of Chapter II.

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auoided” wrote another: “because they both harme and deceiue.” “Christ did never laugh on earth that we read of” wrote yet another, “but he wept.”²⁸

During their brief triumph, after 1649, they set about enacting their prejudices into law. They harried the Catholics and Anglicans. They closed the theatres. They cut down the Maypoles and abolished Christmas. They made all sex outside marriage a misdemeanour on first offence: on second offence, it was made a felony, punishable by death. To be sure, many dissenters became Lockeans; but the main dissenting creeds were anything but Lockean.

This being said, the Dissenters did a service to the Constitution by attaching their own cause to it. They added a religious sanction to the defence of Common Law and Constitution in an age when religion was an immensely powerful force in politics, and when Common Law and Constitution needed all the strengthening available. For them, royal despotism and the Catholic faith were one and the same. And in spite of all they did when they had the power to brush Parliament aside, it was their enthusiasm against the Stuarts that ensured the victory of Parliament in the Civil War.

But regardless of how badly damaged the Royalist cause emerged from the Civil War, the theoretical underpinnings of the Common Law argument were also damaged. Its defects had been sharply revealed. The central decades of the 17th century had seen all the threads of legal continuity snapped. The men who saw the Monarchy restored in 1660, had lived through two civil wars, a regicide, two military *coups* and any number of written constitutions, some adopted, others drafted and argued over. To them, inherited custom in itself no longer seemed to bind. In spite of its logical absurdity, the Common Law doctrine had been psychologically sufficient in an age when the institutions of state really did seem to have descended from time immemorial. It could not satisfy so well in an age when these institutions had been swept away and replaced by others, only eventually - and largely by surprise - to be restored.

²⁸ All quoted by Buckle, *op. cit.*, Volume III, Chapter. IV, “An Examination of the Scotch Intellect During the Seventeenth and Eighteenth Centuries” - in my edition Volume III, pp. 254-5. Admittedly, these are Scottish examples. But they can stand for the more extreme of the English sectaries.

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Of course, time can smooth away any number of shocks; and a generation of stability after 1660 might have allowed the psychological threads to reconnect to time out of mind, just as they had a century earlier. But there was the further unsettling influence of the royalist antiquarians and the absolutist philosophers. The first were showing how the Constitution had not remained fixed, but had evolved over hundreds of years. The second were actually stepping outside the debate over the Constitution to pour scorn on all sides.

It was Sir Henry Spellman, writing under Charles I, who knocked the first real holes in the Common Law argument. Looking through the same records as the lawyers, but reading the Latin in its plain meaning rather than those attached by the lawyers, he discovered the feudal innovations of William the Conqueror, and was able to trace in outline the gradual softening of these over the centuries into the freeholding Constitution of the seventeenth century. Spellman remained to some extent fixed within the Common Law tradition - even repeating the insistence that William had not been a conqueror.²⁹ But he was followed by other antiquarians, culminating in Robert Brady, whose writings of the 1680s were a deadly response to the Whigs in their use of the Common Law against the despotic ambitions of Charles II and his brother James. Supported by masses of evidence, most of it true, these accounts undermined the notion of immemorial custom, and therefore cleared the way for an assertion of royal power. For if Parliament was younger than the Monarchy, everyone agreed, it was plainly subordinate to it in every respect.

About the only effective reply to this line of reasoning came from men like Thomas Hobbes. But they posed an even more deadly threat to the Common Law doctrine. What relevance, asked Hobbes, could the past have to the present, except as explanation? In every state, he argued, there must necessarily be a sovereign power, and this must have the full power to order things as it found convenient. It may be convenient to order a state in line with its historical experience. But this is not to posit any limitations on the power of the sovereign, whose will cannot be resisted. "The sovereign of a commonwealth" he argues,

²⁹ Pocock, *op. cit.*, p. 149.

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be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may when he pleaseth free himself from that subjection, by repealing those laws that trouble him and making new; and consequently he was free before. For he is free, that can be free when he will: nor is it possible for any person to be bound by himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound.³⁰

Law, according to this way of thinking, is nothing but the expressed will of a sovereign law-giver. It overturns the Common Law argument - not by contesting it from within, as the Royalist antiquarians sought to do, but simply by denying it any logical force. For "[t]he opinion

that any monarch receiveth his power by covenant, that is to say, on condition, proceedeth from want of understanding this easy truth, that covenants being but words and breath, have no force to oblige, contain, constrain or protect any man, but what it has from the public sword.³¹

In the generation after 1660, the force of Hobbes' thought was blunted by its novelty. Very few Englishmen could understand what he was saying. Moreover, his argument took people in directions that hardly anyone wished to go. The debate of the age was not the Common Law against divine right monarchy, but an argument within the Common Law tradition. Even the Royalists who had followed Charles II into exile accepted the immemorial nature of the English Constitution, and disagreed with the Parliamentarians only over its interpretation.³² They were not inclined to take up a line of reasoning that cut their opponents to pieces, but also meant accepting views no less deadly to their own, and that sanctioned a government vastly more absolute than anything they themselves wanted.

Far more dangerous were the works of Sir Robert Filmer. He also believed in absolute

³⁰ Thomas Hobbes, *Leviathan: or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (1651), Chapter XXXVI, "Of Civil Laws" - in my edition (George Routledge and Sons, London, 1885), p. 124.

³¹ *Ibid.*, Chapter XVIII, "Of the Rights of Sovereigns by Institution" - p. 85.

³² Royalists of the school of Hyde, for instance, remained common lawyers in their predilections and consequently believers in the ancient constitution; the limit of their political beliefs was the assertion that a freely functioning royal prerogative formed an essential part of the constitution, and the limit of their use of history was the attempt to find precedents proving its existence. (Pocock, *op. cit.*, p.148).

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sovereignty but hedged it - often in ways that disguised it - with arguments about the origins of Parliament and a mass of Scriptural quotation.³³ Read today, his writings cannot but strike as some of the most foolish things ever written in English. Published during the Exclusion Crisis of 1679-83, they had a tremendous effect. They gave heart to the radical Tory fringe who stood against every attempt to prevent James Duke of York from succeeding his brother Charles II, or even to limit his powers if he was to succeed. They caused explosions of outrage among the Whigs, cutting as they did through nearly a century of consensus over the Common Law.

The opponents of Charles II and James II faced ideological problems that the opponents of James I and Charles I had never had to consider. They were forced to choose. They could continue insisting, against all the evidence, that there had been no Norman Conquest; or they could find another support. Those who looked for another drew on various traditions - on the Greek and Roman stoics, on the mediaeval schoolmen, on the Jesuit controversialists. The classic expression of the resulting synthesis can be found in Locke's *Second Treatise*.

But, as said, this was not a typical expression. It may be one of the few works of political philosophy to have been continuously read since the seventeenth century, but it was surely among the least understood and appreciated in its own day. Then, it was the *First Treatise* accompanying it that made Locke's reputation as a writer on politics. Hardly read at all now, this is a long and elaborate refutation of Filmer's *Patriarcha*, and is argued on Filmer's own grounds. The oddly abstract speculations that followed it were out of sympathy with the age - even after the arguments from the immemorial and unchanging nature of the Constitution had been thoroughly unsettled. The pure theory of natural liberty was just as unsuited to the age as was the pure theory of sovereignty. It was too geometrical. It went too far with its uncompromising statement of rights that were not always recognised by the existing Constitution. It made scarcely more sense to the generation of Somers and Newton as would an explanation of quantum mechanics.

³³ The modern edition of Filmer's works is Peter Laslett (ed.), *Patriarcha and Other Political Works of Sir Robert Filmer*, Oxford University Press, Oxford, 1949.

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More congenial were the *Discourses Concerning Government* of Algernon Sidney, published in 1698. Another attack on Filmer, these cover roughly the same ground as Locke, but every point is supported at least in part by the usual appeals to history and Scripture. There are long discussions of the Norman Conquest - denying it happened, denying that William made himself master of the soil, denying that the Stuart Kings had inherited any powers beyond those consistent with a limited parliamentary constitution.³⁴

Sidney differs also from Locke in his more restrictive view of freedom. Locke is a radical individualist. His argument begins with an assertion of the individual's inborn, inalienable rights to life, liberty and property. All social arrangements are merely contrivances for maintaining these rights and for making their possession more enjoyable. For Sidney, the community is at least as important. He follows the ancients into the trap of confusing liberty with national independence. Thus, he heaps the most lavish praise on Sparta and Republican Rome, neither of which could be considered free countries in the Lockean sense.³⁵ This was certain to please anyone who wanted another Puritan Commonwealth.

More importantly, he fails to conceive how freedom limited only by the equal rights of others can be combined with order and political stability. He is like those modern conservatives, who stand so nearly on the border with liberalism, and make such nearly liberal statements, that to a casual glance they can pass as other than they really are. Freedom is glorious, he proclaims - but requires moral supervision. For, without this, people will fall into vice; and private actions have

³⁴ See, for example, Chapter Threc, section 29, "The King was never Master of the Soil" (Algernon Sidney, *Discourses Concerning Government* (1698), (pp.493-97 of the edition published by Liberty Classics, Indianapolis, 1990))

³⁵ For example,

...the Spartans desiring only to continue free, virtuous, and safe in the enjoyment of their own territory, and thinking themselves strong enough to defend it, framed a most severe discipline, to which few strangers would submit. They banished all those curious arts, that are useful to trade; prohibited the importation of gold and silver; appointed the Helots to cultivate their lands, and to exercise such trades as are necessary to life; admitted few strangers to live amongst them; made none of them free of their city, and educated their youth in such exercises only as prepared them for war. I will not take upon me to judge whether this proceeded from such a moderation of spirit, as placed felicity rather in the fullness and stability of liberty, integrity, virtue, and the enjoyment of their own, than in riches, power, and dominion over others...

(*ibid.*, Chapter Two, section 22, "Commonwealths Seek Peace or War according to the Variety of their Constitutions" (pp. 203-4))

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public consequences. Therefore,

those who uphold popular governments, look upon vice and indigence as mischiefs that naturally increase each other, and equally tend to the ruin of the state. When men are by vice brought into want, they are ready for mischief: there is no villainy that men of profligate lives, lost reputation, and desperate fortunes will not undertake. Popular equality is an enemy to these; and they who would preserve it must preserve integrity of manners, sobriety, and an honest contentedness with what the law allows.³⁶

Not surprisingly, the Glorious Revolution of 1688 produced few radical changes on the surface. Alone of all the great revolutions, indeed, it was carried through by men who desired at all costs to deny that it was a revolution. Mindful of how their fathers had acted in 1641, they avoided both violence and grand gestures. Hardly anyone in the Convention called by William was anything but a firm believer in the Common Law and ancient Constitution. The only question debated was in what sense that Constitution was to be understood after four years of James II. It is almost surprising that the Resolution emerging from the debate contains even one clause that might be regarded as Lockean. It was resolved that James,

having endeavoured to subvert the constitution of this kingdom by breaking the original contract between King and People, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant.

This was a deliberately inclusive formula, uniting every element in the coalition that had assembled round William at Hungerford. But the main emphasis is on subverting the Constitution and violating the fundamental laws. These concepts went unquestioned in the debate. It was the words “original contract” that caused the most trouble. Gilbert Burnet tells

³⁶ *Ibid.*, Chapter Two, sec. 24, “Popular Governments are less subject to Civil Disorders than Monarchies; manage them more ably, and more easily recover out of them” (p.229). See also “Foreword” by Thomas G. West:

[A]lthough Locke was more often quoted, the core of Sidney’s thought probably represents better than Locke’s the spirit of American republicanism (p.XXVII).

Certainly, no edition of Locke’s *Second Treatise* appeared in America between 1773 and 1937 - Locke, *op. cit.*, Laslett’s Introduction, p.125.

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how some of the Lords in the upper house of the Convention asked where this contract was kept, or how it might be come at. They were given a vague answer about how every legal government implied a contract of some kind; and it seems to have been understood that the words were not intended to have any meaning beyond being a synonym for ancient Constitution.³⁷

Somewhere in his writings, Marx calls the Glorious Revolution a “palace *coup*”. Somewhere else, Disraeli dismisses it as having done no more than introduce England to “French wars, Venetian politics and Dutch finance”. Recent historians have dropped the adjective, and have taken to surrounding the noun with quotation marks. Undeniably, it was carried through not to establish the inalienable rights of man to life, liberty and property, but to preserve the inherited rights of Englishmen. Yet, looking past the intellectual timidity of the anti-Stuart coalition that finally triumphed in 1688, what they achieved was both revolutionary and, in liberal terms, glorious. They may have intended to achieve less than they did. But what they did achieve has justly earned them the veneration of all real friends of humanity.

Three: The Administrative Vacuum of the Eighteenth Century

Though never on the Continental scale, the Tudor and early Stuart monarchs had developed a centralised and fairly efficient administration. The counties might be ruled by the Justices of the Peace, and the towns by the municipal corporations - and both therefore by the leading local families. But these were in turn closely supervised by the Privy Council and the Councils of Wales and of the North. The Church was supervised by the High Commission, and the legal system by the Court of Star Chamber. Through these bodies, a mass of moral and economic regulation was imposed. Religious dissent was punished. Juries were intimidated. Monopolies and wage and price controls were enforced.

Then, in 1641, excepting the Privy Council, which was greatly weakened, the whole central administration was either abolished outright or made impotent. It had been alien to the

³⁷ Gilbert Burnett, *History of His Own Time* (1723-34), Book IV.

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Constitution. It had been used too extensively to usurp the authority of Parliament and the Common Law. It was not reconstituted after 1660, and the devolution of most government into local hands was quietly accepted. From then on, the only means of government were according to the Common Law or by Acts of Parliament made under the influence of the Common Law and interpreted and enforced by the courts of Common Law.

The result of this was a severe limitation of governmental power. It is worth emphasising that this was not brought about by explicit limitations on the power of government to seek specific ends, as happened in America. All through the eighteenth century, minority groups were persecuted by the authorities. Catholics and Dissenters were denied a range of civil and political rights. Men who engaged in homosexual acts were hunted down more ferociously than in any of the absolutist monarchies of Europe - even if with less venomous persistence and fewer prohibitory laws than was later the case in England.³⁸ The Common Law has never sought to prevent any stated end of government. It is the *procedure* of Common Law, with its requirement of due process and consistency between cases, that makes the ends to certain means impossible. There is no rule of Common Law that prevents a government from trying to regulate prices. It simply prevents the sort of administrative supervision and discretion without which they cannot be regulated. It was because of these limitations that the Tudor Monarchs had bypassed the Common Law and relied instead on their Councils and Commissions. Without these, administration in the European sense was abolished.

³⁸ There were three main persecutions during the half century following the Glorious Revolution of 1688 - in 1699, in 1707, and in 1726. In this last, more than 20 molly houses were watched and raided. The likelier open places were patrolled. There was a spate of prosecutions for buggery and various less serious Common Law offences.

In 1726, one William Brown was entrapped while cruising in Moorfields. Asked at his trial what could have led him to make advances to the *agent provocateur*, he replied:

"I did it because I thought I knew him, and I think there is no crime in making what use I please of my own body"

(*Select Trials for Murders, Robberies, Rapes, Coining, Frauds and Other Offences at the Sessions House in the Old Bailey*, London, 1742, Volume 3, p.39-40; quoted, Alan Bray, *Homosexuality in Renaissance England*, Gay Men's Press, London, 1982, p.114).

Had the Jury been composed of Lockeanes, he ought surely to have been acquitted, if not carried shoulder high into the street. The City Jurymen were unimpressed; and Brown was sentenced to stand in the pillory.

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There was, for example, no concept of administrative law. In France, the object of royal policy all through this period had been to release administration from the control of law. The ordinary courts had been corrupted by the fiscal needs of the State. Judicial offices were created and sold to the highest bidder. The buyers joined a large class of irremovable office holders. Ignorant sometimes of the law, but never of their right to the fees from which their income derived, they made justice both expensive and uncertain. Yet, despite their corruption, these courts were still feared by the Government. They might apply the fixed rules of law, and might punish officials judged in breach of the law. So, from the Controller General down to the lowest contractor on the roads, public servants were granted immunity from prosecution in the normal courts. Cases were heard instead by special administrative tribunals. The reason why was put very plainly by a Minister: "a state official indicted before an ordinary court would certainly find the judges prejudiced against him; and this would be to undermine the royal authority".³⁹ The rules of justice were partially or altogether suspended whenever "the public good" was invoked.

Administrative law was the instrument by which France was made into an absolute centralised despotism - a despotism tempered only by inefficiency and corruption. The Government took property for public use without compensation. It censored the press. It imposed punishments without the shadow of due process. A *lettre de cachet* - that is, a signed letter from the Royal Council - was enough to have someone imprisoned or exiled for as long as directed, and without any legal redress. These were obviously used to put down dissidence - as when, in 1749, a mild criticism of state policy earned the poet Désforbes three years in an iron cage. They were also the private weapon of anyone able to persuade or bribe a Minister into issuing one.

In England, punishments could only be imposed by the Common Law courts. This ensured that the administrative authority of government was continually checked in ways that Europeans found astonishing.

Take revenue collection. Even the imposition of Ship Money in the time of Charles I had been

³⁹ Translated from Alexis de Toqueville, *L'Ancien Régime* (1859), Livre II, Chapitre IV (Oxford University Press edition of 1969, p. 64) - translated, Sean Gabb.

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subject to challenge before the courts; and it was only by a majority of a packed Bench that this tax had been judged legal. The more regular taxes allowed by Parliament after 1660 were continually avoided by legal challenges and creative uses of existing law. In the 1660s, a Derbyshire innkeeper named Michael Heathcot found a way round the beer excise by serving beer free to his guests who paid for the untaxed food, lodging and fodder that he provided. The only response available to the authorities was to procure a change in the relevant Act of Parliament. In Monmouthshire, innkeepers simply shut their doors in the faces of the excisemen, who had no legal power to break doors open.⁴⁰ In France, tax gatherers were little more restrained than a gang of thieves. In England, taxes were effectively limited to things like land and windows and foreign trade. The first two had the advantage of being assessable with minimum intrusion; and the few disputes that arose over assessment and collection could be reliably left to the courts. The third were paid either by foreigners or a small minority of the population.

The one serious attempt to expand the tax base before the end of the eighteenth century was Walpole's Excise Bill of 1733. This would have achieved a number of desirable ends. It would have checked smuggling, and increased the carrying trade of England, and made London into a free port, and have allowed a reduction or repeal of the land tax. These were desirable except for the means. As proposed, the measure would have raised up a small army of officials with powers of inspection over shops and warehouses, and even private dwellings - powers that would have necessarily have been couched in terms alien to the Common Law. The proposal was shouted down by virtually the whole country, and was quickly abandoned.⁴¹

Or take the suppression of political dissent. The only means allowed for this were the laws against high treason and seditious libel. On paper, these were ferocious laws; and they could be made into instruments of great cruelty and injustice in times of panic - as happened between 1670

⁴⁰ Michael J. Braddick, *The Nerves of State: Taxation and the Financing of the English State, 1558-1714*, Manchester University Press, Manchester, 1996, p.163.

⁴¹ For a good account of the Excise Crisis, see John Morley, *Walpole, "Twelve English Statesmen"*, Macmillan, London, 1890, 166-82.

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and 1688, and again in the 1790s. For the most part, however, they were very limited instruments. Torture had always been illegal under the Common Law, and no forced confession could be received by the courts. The *Habeas Corpus* Act 1679 strengthened the old guarantees against arbitrary arrest and detention.

Above all, the political laws could be enforced only in courts where a Jury was the final judge of all matters of fact. After *Bushell's Case* (1679), the right was unquestioned of Jurymen to find whatever verdict their conscience directed, even if against all the prosecution evidence. This was an effective check on at least unpopular oppressions. It saved Lord George Gordon in 1780, and has continued to save large numbers of lesser victims to the present day. Added to this, Judges were given security of tenure during good behaviour after the Revolution; and the purges for political unsoundness that disgraced the reigns of Charles I and James II were not repeated. Thereafter, a Judge might be friendly to the authorities, and might try leading Juries into favourable verdicts - but there was no punishment available if he chose to enforce the law as he conceived it.

And as the eighteenth century advanced, such administrative discretion as had survived after 1641 was limited still further. The whole concept of administration was narrowed to the fulfilment of duties imposed by the Common Law or Act of Parliament. Any Minister or official who exceeded his legal authority could - and sometimes did - have to stand in court like any other trespasser. In the most famous case arising between an individual and the authorities, *Entick*, a printer, sued two officials in 1764 for having broken into his house and seized his papers. Nothing had been found in the raid on which a prosecution could be founded, and the suit was for the trespass that had thereby been committed under Common Law. The officials pleaded a warrant signed by one of the Secretaries of State. This was based on a loose custom that had survived the lapse of the Licensing Act in 1695 - that is, the press censorship law with which the later Stuarts had tried to control public opinion. The Act had created wide powers of search and seizure of documents. The warrant used against *Entick* was a vague document that specified neither the place to be searched nor the things expected to be found there. It was a "general warrant" - or, in modern terms, it sanctioned a "fishing expedition". It was hoped that a search

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of Entick's papers would reveal evidence of on which could be based a prosecution for seditious libel.

These powers of search and seizure had survived their enabling Act largely because they were hardly ever used after 1715, and so no one saw fit to question their survival. The early years of George III, however, saw a revival of political dissent; and the authorities looked round for means of suppression. The attempted prosecution of Entick was part of a general scheme that had been inspired by the reaction to the pamphleteering of John Wilkes. The problem for the Government was that it had to face absolutely independent courts to justify not merely its use of general warrants, but their very existence.

Entick v Carrington turned on a simple point. In pleading the Secretary's warrant, the officials were relying on the Protection of Constables Act 1750, which barred prosecutions for search and entry under warrant when no evidence of illegalities was found. Entick's lawyers claimed that the Act did not apply because the Secretary's warrant was itself illegal. There was neither Common Law nor statutory authority for an individual Privy Councillor to act as a Magistrate except in cases of high treason. Nor, supposing such a jurisdiction to exist, was there any authority for warrants of this type.

Passing judgment in the case, Lord Chief Justice Camden of the Common Pleas agreed, declaring the warrant unlawful. He went further. In their alternative submissions - in case they lost on the strict legality of the warrant - the Crown lawyers had argued that public policy required a certain arbitrary discretion in crimes affecting the stability of government. He rejected this argument, saying:

With respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.⁴²

⁴² *Entick v Carrington* (1765), 19 *State Trials*, at col. 1073. Oddly enough, such warrants still are partially illegal - despite the provisions of the Police and Criminal Evidence Act 1984, the Public Order Act 1986, the Security Services Act 1989, and a multitude of other recent statutes.

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By this judgment, Camden struck down the main remnants of a power that existed unquestioned at the time in every other civilised country, and that exists again unquestioned in both Britain and America. It was the classic statement of a view that had prevailed with increasing force since the beginning of the traditionalist opposition to royalist centralism in the days of James I - that it was the duty of officials not to do the bidding of government, but to obey the law. In *Entick v Carrington*, David Hume's comment on the Revolution Settlement finds its most concrete expression:

No government, at that time, appeared in the world, nor is perhaps to be found in the records of any history, which subsisted without the mixture of some arbitrary authority, committed to some magistrate; and it might reasonably, beforehand, appear doubtful, whether human society could ever arrive at that state of perfection, as to support itself with no other control, than the general and rigid maxims of law and equity. But the parliament justly thought, that the King was too eminent a magistrate to be trusted with discretionary power, which he might too easily turn to the destruction of liberty. And in the event, it has been found, that, though some inconveniences arise from the maxim of adhering strictly to law, yet the advantages so much overbalance them, as should render the English forever grateful to the memory of their ancestors, who, after repeated contests, at last established that noble principle⁴³

In general, whether local or national, the tendency of government was to atrophy. Even had anything been desired of it, what remained of the central administration was too modest and too corrupt to interfere. Funds were embezzled or unaccounted for during years on end. An actual civil service barely existed. The two Secretaries of State, who directed most Government business, had a total working staff, including caretakers, of about two dozen. As for the local justices and corporations, with the supervisory Councils abolished, these could govern as much or as little as they pleased. Since they had to raise their own funds, they generally preferred the latter. Without express repeal, much of the older regulatory legislation - even what needed no

⁴³ David Hume, *History of England* (1762), Vol. V, p.280.

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administrative discretion to enforce, fell quietly into desuetude.⁴⁴

Now, in looking at eighteenth century England, we see a state of affairs quite unlike any others that have existed anywhere else in the world, before or since. The anti-Stuart reaction in the previous century was unusual in its opposition to the whole trend of Continental thought; but its success can be explained by virtue of the wild passions aroused in the debates of the age. Obviously, the stifling of administrative law had been welcomed by the local *élites* into whose hands the remaining powers of the State was passed. Just as obviously, the final settlement made in the Glorious Revolution had been accepted by the commercial and noble classes as a whole. Those who had not minded the despotism of Charles I had suffered under that of Cromwell. Both Whigs and Tories inherited a fear of centralised power from their fathers; and this was renewed by the impartial despotism of James II. But, during the 18th century, while the relevant interests continued to benefit, the practical reasons to fear centralisation diminished.

We should, then, have expected to see a renewed impulse towards centralised government. The arguments used by Joseph Chamberlain in the late nineteenth century should have been heard in the eighteenth. Big government had been a bad thing under the Stuarts, the argument might have gone, because it was then the instrument of Kings who wanted to abolish the ancient Constitution. They had all been hostile to Parliament and the Common Law; and one of them had tried to undo the Reformation in England, and had briefly undone it in Ireland. It had therefore been right to resist them, and right to accept a conception of government that barred many desirable ends from being achieved. But now the Revolution was complete, and power rested in the hands of a Parliament chosen by the nation and a King whose title had no higher source than Act of Parliament, why keep up the old suspicions? Why not forget some of them

⁴⁴ On this point, see Oliver Goldsmith:

There is scarcely an Englishman who does not almost every day of his life offend with impunity against some express law, for which in a certain conjuncture of circumstances he would not receive punishment. Gaming-houses, preaching at prohibited places, assembled crowds, nocturnal amusements, public shows, and an hundred other instances are forbid and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal or mercenary will attempt to enforce them.

(Oliver Goldsmith, *Citizen of the World* (1765), quoted, Dicey, *op. cit.*, Lecture V, "The Period of Old Toryism", p. 75)

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for the sake of convenience? With the great contest over, the passions used to exalt the Common Law might have subsided, and the more usual contest recommenced - in which the special interests wheedle and push for influence, resisted only by a general prejudice in favour of liberty.

But this did not happen. All through the eighteenth century, the passions that had inspired the Revolution Settlement were visibly subsiding, but the Settlement itself persisted - and, as said above, even continued shedding the despotic elements that had survived the Revolution. Men whose grandfathers had been too young to live under James II, let alone Charles I or Cromwell, retained prejudices against central and discretionary power that were not only irrelevant to their immediate interests, but often hostile to them. Even landowners, whose taxes would at least have fallen, were prominent in opposing Walpole's Excise Bill. Even householders, whose lives and property might have been better secured, opposed the slightest move towards a police force⁴⁵; and, as Jurymen, they showed no mercy to officers of the law indicted for going beyond their legal powers in quelling riots and other disturbances.

The Revolution Settlement was preserved by the dominant legal and political philosophy of the age. This set the agenda of debate. It set the criteria by which people conceived their interests. Though not the same as the one that had justified resistance to the early Stuarts, this philosophical outlook was a plain development of it. The challenges of both antiquarians and

⁴⁵ Opposition to a State police force was as firm as opposition to a general excise - and for the same reason, that it would have required the existence of powers alien to the Common Law. See William Paley:

The liberties of a free people, and still more the jealousy with which those liberties are watched, and by which they are preserved, permit not those precautions and restraints, that inspection, scrutiny and control, which are exercised with success in arbitrary governments. For example, neither the spirit of the laws nor the people, will suffer the detention and confinement of suspected persons, without proofs of their guilt, which it is often impossible to obtain; nor will they allow that masters of families be obliged to record and render up a description of the strangers or inmates whom they entertain; nor that an account be demanded, at the pleasure of the magistrate, of each man's time, employment, and means of subsistence; nor securities to be required when those accounts appear unsatisfactory or dubious; nor men to be apprehended upon the mere suggestion of idleness or vagrancy; nor to be confined to certain districts; nor the inhabitants of each district to be made responsible for one another's behaviour: least of all will they tolerate the appearance of an armed force, or the military law, or suffer the streets and public roads to be patrolled by soldiers; or, lastly, entrust the police with such discretionary powers as may make sure of the guilty, however they involve the innocent. These expedients, although arbitrary and rigorous, are many of them effectual: and in proportion as they render the commission or concealment of crimes more difficult, they subtract from the necessity of severe punishment.

(William Paley, *Principles of Moral and Political Philosophy* (1785), 17th edition 1809, Vol. II, pp. 295-97).

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naturalist philosophy had been faced and overcome. The enlightened urbanity of eighteenth century thinking removed further rough edges from it. What emerged by about 1760 was a clear and persuasive set of arguments in favour of maintaining an order of things inherited from the past.

The older fictions abandoned, it was now recognised that the Constitution was the product of a long evolutionary growth of rules and institutions. The Constitution of 1750 was not the same as that of 1550, and still less that of 1350 or 1150. Between each of these dates, innovations had been made. Which were good and which bad had been shown by experience. And innovations would continue to be made in the future, either because needs would arise that were not yet provided for, or because earlier innovations would turn out to be defective.

The Common Law view of the past remained, but in a modified form. It was still maintained that the Constitution was of immemorial origin, having been brought to England by the Angles and Saxons. This no longer meant asserting that Henghist and Horsa had carried with them the full English law of real property as known by Coke. It meant instead that English political culture had always placed high emphasis on the rights to life and liberty and of resistance to despotic power. This emphasis had been seen repeatedly at work throughout English history, shaping the growth of a free Constitution and preserving it against external and internal attack. The growth had been checked by William the Conqueror, but was restarted with new vigour in the national revolt that forced John to sign the *Magna Carta*. It had been checked again by the relatively despotic Tudors; but it was restarted with overpowering vigour during the Stuart period. In a sense, the Glorious Revolution introduced new principles into English Government - for instance, that Ministers had to be not merely responsible to Parliament, but continually acceptable to it. But it was also a deeply conservative reaffirmation of the ancient liberties of Englishmen.⁴⁶

There was still the question, as in the previous century, of how to maintain those liberties and hand them on undiminished to the following generations. The answer now was to develop the

⁴⁶ For perhaps the most developed expression of this view, see Chapter I of Macaulay's *History* (*op. cit.*), and the noble passage that concludes Chapter X.

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flashes of insight in the works of Coke and Davies and Hale into a general theory of social order. How this was done can be stated in a series of connected propositions:

First, human beings are not “rational” in the sense claimed by the philosophers of the European Enlightenment. We exist within frameworks of rules and expectations that are always complex and are usually well-suited to some standard of convenience, but which we have not ourselves made, and which were never in the past consciously designed or discussed, and which are mostly not even fully understood. Instead, these frameworks are the product of a social evolution analogous to the natural evolution that Darwin later discovered to underlie the variety of animal forms and their adaptation to environment.

An act is done and it benefits the actor. Sometimes, its benefit will be recognised. If so, it will be repeated by the actor as appropriate and imitated by others. Most often, it will not be recognised as a cause of benefit. If so, it may never be repeated, or it may be repeated and imitated along with much else that is purely incidental or even of contrary value to the benefit. Its adoption may entail the rejection of some other behaviour, or perhaps will need less radical modifications, in order for it to be fitted into an internally consistent body of existing custom. After a while, its origin - even if ever known - will be forgotten; and future generations will inherit another of the customs or institutions by which they will unthinkingly guide most of their behaviour.

In some cases, an institution can be explained and given rational justification in a later, more enlightened age than the one in which it emerged - private property, for example, or marriage. But this can happen in only a small number of cases, for much of the information that is available to us for directing our lives cannot be reduced to the status of discussible hypotheses. It will be instead embodied in custom and prejudice, the justification of which must often be obscure.

This view of human understanding is less flattering to human vanity than the rationalist notion of the conscious, designing intelligence. But it is more in accord with the known facts, explaining how people - no matter how learned or ignorant - have access to far more knowledge

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than they can develop for themselves, or prove by themselves.

Second, the view raise a presumption in favour of whatever is old and established. It may seem on first inspection that some particular law or public custom has no use. But the fact of its survival into the present indicates that it once was, and might still be, useful - or that, even if useless or harmful in isolation, it is necessary for the survival of something that really is useful, or even for the survival of the whole system.

When, therefore, we come to an examine a functioning social order such as our own, the most proper attitude is one of curiosity mingled with reverence. We are not to seize on its apparent faults and reject it in favour of something else spun out of a single head. Nor are we to advocate sweeping reforms simply on the grounds of “modernisation” or some other modish slogan. We must instead try to understand the inner workings of society - to conjecture by what innumerable and infinitesimal stages the present order of things evolved to its present sophistication. This will require us to look even to those habits and institutions that rest on justifications manifestly absurd, asking whether they might not nevertheless serve a useful purpose. Then, and only then, shall we be ready to consider what deliberate changes may be necessary, and how these may best be combined with what already is.

Third, the greatest danger to society in an enlightened age is the very attitude responsible for progress in the arts and sciences. These proceed most smoothly by a continual questioning of existing knowledge - asking if it is most in accord with the known facts, or if there is some other, more economical means of explanation. Applied to matters of social organisation, the scientific method must inevitably raise doubts regarding the wisdom of what is. As said, not everything can be readily justified. Certainly, there are arguments to be put for presuming that customs and institutions contain a hidden rationality. But these will often seem - and occasionally will be - nothing but a sophisticated defence of great social evils for which a complete answer seems within easy reach. And one victory for the forces of radical enlightenment will establish a precedent for other attacks and victories, until the whole social is overthrown in an orgy of apparent reforms.

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The danger must be avoided by doing nothing to shake the existing power of custom. One of the mental habits with which the evolution of customs has equipped us is a reverence for whatever is old. It can be found in every primitive society, and is the essential preservative of what little civilisation is possessed by such societies. There is a psychological value in age. Institutions that are old, or that appear to be old, can shelter within a ring of associations that may be powerful enough to restrain all but the most determined tyrant or democratic mob. Changes there must be, of course. But the best change is to be so cautious and incremental that only those directly affected notice its happening. Even the most radical, sudden change is best achieved so that within only a few years it becomes difficult to tell the old from the new.

All this has so far been expressed in abstract terms. An example may be best to complete the explanation. In giving this, let us avoid the standard ones that can be drawn from the French Revolution at the end of the eighteenth century. Let us look instead at one from a later time and from an alien and now dead civilisation.

In 1911, there was an epidemic of bubonic plague in Manchuria. This was large enough to worry all the usual governments and international organisations - there were fears of a new Black Death - and so much effort was put into containment.

Now, it was soon discovered that the carriers of the fleas which in turn carried the *Pasteurella pestis* bacillus were marmots, large burrowing rodents who were hunted for their skins. It was also discovered that the nomadic tribesmen who had hunted marmots for centuries were largely unaffected. Mostly affected were the Chinese hunters who had just poured into Manchuria following the collapse of the Manchu dynasty and the lifting of all controls on movement into the region.

The reason for this difference was that the native hunters followed certain customary rules that tended to minimise the risk of infection. They never trapped marmots, but only shot them. If an animal moved sluggishly, it was left alone. If an entire colony showed signs of infection, the hunters would at once pack their tents and move on.

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Only in 1894 had the causes of bubonic plague been identified. Before then, its means of transmission had been an absolute mystery. Yet here was a nation of illiterate nomads not only doing as the newest research might have advised them, but doing it by custom since time immemorial. Asked why they acted so, they gave the most bizarre mythological justifications that said nothing about the avoidance of infection. There was no talk of some divinely inspired ancestor whose teachings had avoided the anger of the gods, or whatever. All the evidence pointed to a long history of slight and unconscious adjustments to environment. As with a purely natural selection, there had been small revisions of habits. Those contributing to greater well-being had been copied and passed on to later generations as ritual.

Ignorant of epidemiology, the Chinese hunters were rational enough to sneer at these rituals. Even if at second hand, they enjoyed the fruits of Western science and technology; and the Manchurian natives lacked the philosophical framework to justify customs in general for which they had no specific justifications. The Chinese went about their business of catching their marmots in the most cost-effective manner. They died in their thousands, and sent the bacillus down the new railway lines towards the rest of humanity. It was only because the causes of plague were now understood that the bacillus did not sweep the world again as it repeatedly had in the past.⁴⁷

This whole line of thinking finds its most perfect expression in Burke's *Reflections on the French Revolution* of 1790. In place of the poor exposition given above, it might be better simply to quote at length from this marvellous distillation of all social wisdom: written with one great public event in mind, it remains a work of universal significance. But let us instead recall a single passage:

...[I]n this enlightened age I am bold enough to confess that we are generally men of untaught feelings, that, instead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted and

⁴⁷ For those interested in following this case further, its full citations can be found in the notes to Chapter 4 of William H. McNeill, *Plagues and Peoples*, Basil Blackwell, Oxford, 1977.

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the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.⁴⁸

In England, it was the “men of speculation” who ensured that the eighteenth century saw no reaction against the Revolution Settlement. The consensus of opinion among them was almost total. Even Edward Gibbon, supposedly the least English of eighteenth century English writers - with his French tastes and Swiss education - was unable to judge the Roman Empire except by Common Law standards. Writing on the complexities of legal procedure, he comments:

The experience of an abuse from which our own age and country are not exempt may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest that such forms and delays are necessary to guard the person and property of the citizen; and that the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry.⁴⁹

Sir William Blackstone is still more emphatic. At the end of Book IV of his *Commentaries*, he breaks forth in this eulogy of the established order of things:

Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due:- the thorough and attentive contemplation of it will furnish its best panegyric.... To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to

⁴⁸ Edmund Burke, *Reflections on the Revolution in France* (1790), “Everyman” edition, J.M. Dent and Sons, Ltd, London, 1910, p.84.

⁴⁹ Edward Gibbon, *History of the Decline and Fall of the Roman Empire* (1776-87), “Everyman” edition, J.M Dent & Sons Ltd, London, 1910, Volume Four, Chapter XLV, pp.443-44.

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the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and the noblest inheritance of mankind.⁵⁰

These men of speculation were not liberals in the manner of John Locke. They did not believe in the unrestrained right of individuals to life, liberty and property. Their defence of custom did often include a defence of burning injustice - the negro slave trade, for example, the press gang, the religious and sexual discrimination by law, the often barbarous criminal punishments, the general sloth and confusion of the procedural law, and so forth.⁵¹ But they did surround the Revolution Settlement with a palisade of words that no interested sophistry could break through. Such reforms as were achieved they carried through quietly, and most often by judgments of the courts - that is, by means that enabled reform to be presented as a statement of what always had been. They saved England from the same tendency to administrative despotism that emerged in Europe in the sixteenth century, and that was to continue undiminished into the nineteenth century, reaching its highest expression before our own century in the Napoleonic police state.

By itself, then, English liberalism was too weak or timid to explain all the freedom that was actually enjoyed during the 18th century. Its effect was magnified by the administrative collapse of 1641. This had in turn been brought about, and was in part maintained, by adherence to conservative ideologies that justified only a limited freedom. At first, this strange circumstance was wholly beneficial. Except after a foreign invasion, or some immense public calamity, no other country has come so close to administrative anarchy as England did. The restraints that held the rest of mankind back were broken down; and the way was cleared for the development of free market capitalism.

⁵⁰ Sir William Blackstone, *Commentaries on the Laws of England* (1765), quoted, Dickey, *op. cit.* p.71-72.

⁵¹ One defect worthy of particular mention was the survival in Common Law procedure of what may be described as torture. If a man accused of a felony refused to plead guilty or not guilty and to be tried "by God and my country", he could not be tried. To make him plead, he was subjected to the *peine forte et dure*. His wrists and ankles were shackled, and he was suspended by these from the walls of a dungeon. He was fed only a scrap of bread and a mug of dirty water. Every day, a new iron weight was placed on his chest. So he continued until he agreed to enter a plea in court or until he died. Many preferred death, because, by dying unconvicted, they saved their families from the forfeiture of assets that followed a conviction for felony. This disgraceful practice was not abolished until 1771, after which a refusal to plead was to be interpreted as a plea of not guilty.

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Four: The Decline and Fall of English Liberty

From here, we move into the nineteenth century - to the dawn of the age which Reade was to celebrate as one of almost perfect liberalism. The case in favour of his claim has already been put, and is a persuasive one; and it must be kept in mind throughout all that is now to be said. It cannot be denied that liberal ideas came to dominate public thought and policy in Victorian England to a degree unmatched before or since. It must ever be for liberals what Periclean Athens is for Hellenists, or what the thirteenth century is for Catholics - as the fullest embodiment of an ideal, and as the criterion by which all other ages are to be judged. But, rightly examined, the age is also one of liberal decay. There is no contradiction. A house may appear in its fullest order and beauty even as its foundations are crumbling. In the same way, Victorian liberalism, beneath its fine exterior, was crumbling.

And it was crumbling throughout the century. When A.V. Dicey took 1870 as the date of transition between liberalism and collectivism, he was mistaking symptoms for causes.⁵² All that happened around 1870 was that the subsidence cracks began to show unmistakably through the stucco. The whole century, not just its end, was an age of liberal decay. For its beginnings, we must go another 80 years back from 1870, to 1789. This was a year notable for two great events. It was the year in which the French *Ancien Régime* collapsed under the weight of its own corruption. And it was the year in which Jeremy Bentham published his *Introduction to the Principles of Morals and Legislation*.

This was not intended to be an illiberal work. Nor has it usually been regarded as one. Bentham states three principles. First, legislation is a science. Second, its purpose is to allow “the greatest happiness of the greatest number”. Third, since individuals are the best judges of what can make them happy, legislation should clear away all those barriers to free action not required to protect the equal freedom of others. Applying these principles to English law and government, he denounced the ancient Constitution as nothing but a fraud.

⁵² See Dicey, *op. cit.*, Lecture VIII, “Period of Collectivism”.

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Where Gibbon saw necessity and Blackstone wise contrivance, Bentham saw only a chaotic mess. English law, he said, had begun as the customs of an illiterate Germanic tribe, and then been added to and adapted in succeeding ages of feudalism and religious frenzy. Over the centuries, almost nothing had been abolished, and the additions had nearly all been made by adapting existing forms and names to new purposes. The parts were often ingenious, but the whole was best regarded less as a “noble pile” than as a labyrinth of fictions in which the smallest conveyance or action required an army of expensive lawyers. As John Stuart Mill wrote half a century later in summarising the Benthamite critique,

the law came to be like the costume of a full-grown man who had never put off the clothes made for him when he first went to school. Band after band had burst, and, as the rent widened, then, without removing anything except what might drop off of itself, the hole was darned, or patches of fresh law were brought from the nearest shop and stuck on.⁵³

Bentham spent the rest of his long life examining and rejecting the details of what had been rescued and maintained by the Common Law thinkers of the seventeenth and eighteenth centuries. The overall justifications he brushed aside as self-interested sophisms. Instead, every specific law and legal practice was examined, and the question was asked - “what use does this serve? If there is a use, can it be served by more direct means?” What need, he asked, to pay two fees for one appearance before a Chancery Master? Why had an action to establish title to land to begin with a mass of fictions about John Doe and Richard Roe? Why was a man denied counsel when charged with a felony, but not when charged with treason or a misdemeanour? Why were the parties to a Common Law action not allowed to give evidence in court? Why might the same dispute require separate actions in a Common Law court and in the Court of Chancery - one to obtain damages, the other to obtain an injunction? Why, in short, was everything so slow, so expensive, so disorderly, so often grossly unjust?

In place of this jumble, he proposed a comprehensive remodelling of the law. The rubbish of

⁵³ John Stuart Mill, *Bentham* (1838), in Mary Warnock (ed.), *Utilitarianism, On Liberty, Essay on Bentham, together with Selected Writings of Jeremy Bentham and John Austin*, Fontana, London, 1962, p.107. This work also contains the first part of Bentham’s *Introduction to the Principles of Morals and Legislation*.

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past ages was to be swept aside and replaced with a set of clear rational codes of law, enforced by courts with procedures so easy to understand that justice would be swift, and comprehensible and affordable to all.

With this went similar arguments for administrative reform. The great Councils had been swept away in 1641, and the functions of administration had withered thereafter. But hardly a single *office* had been abolished. In place of anything worth calling a civil service, the Government at the end of the eighteenth century had an immense mass of patronage to distribute among its servants and supporters. Most of these offices had names stretching back to Tudor or even mediaeval times. Every area of government was filled with sinecures. The more lucrative were taken by the Ministers and Judges to swell their official salaries, or given to their friends and relatives to cement the bonds of obligation on which English politics then rested. Very few had actual duties attached to them. Some - such as the Tellership of the Exchequer - combined an absence of duties with salaries of more than £20,000 (which translates into about £1 million in 1990s terms). A few were even hereditary.

For personalities who filled these offices in the early nineteenth century, look at Lord Auckland, who received £1,400 a year as Vendue-Master at Demerara, a place he had never visited, and £1,400 as Auditor at Greenwich Hospital, without the least competence to audit an account, nor any obligation to try.⁵⁴ Or look at the Duke of St Albans, who was Hereditary Grand Falconer and Hereditary Registrar of the Court of Chancery. Without touching a single falcon or registering a single suit, he took an annual salary of £2,000.⁵⁵ Or look at the hundreds of aristocratic “wine-tasters”, “sweepers”, “store-keepers”, “harbour-masters”, “packers”, and “tide-waiters” who dirtied their hands only to the extent of going once every quarter to the relevant office in Whitehall to sign their names in a ledger and receive the latest payment of their salary.

There were thousands more of less valuable places. These were handed out as incentives to

⁵⁴ John Wade, *Extraordinary Black Book*, 1816, pp.488-9, quoted, W.D. Rubinstein, “The End of ‘Old Corruption’ in Britain”, *Past and Present*, London, Number 101, November 1983, pp.66.

⁵⁵ *Ibid.*

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friendly journalists and organisers of election campaigns, or as rewards to favoured poets and painters, or as consolations to well-connected unfortunates.

Such duties as did attach to these offices were performed by clerks employed at a fraction of the salaries attached. Because the pay and prospects were so limited, these clerks were usually of little ability and often corrupt. At best, they were fitted for nothing beyond a drudging routine. At worst, their follies and peculations compromised the effectiveness of the armed forces. Anyone who reads their dispatches must half suspect that Nelson and Wellington fought their battles largely to relax from their much harder war to get their men paid on time and to get munitions that might be usable against the enemy.

The cost of this bizarre substitute for a civil service cannot be accurately known, but must have consumed a noticeable share of the British national income.

Then there was Parliamentary reform. The electoral system had been settled centuries before. The counties were each to send two Members, elected by the 40 shilling freeholders. Certain boroughs were each to send two, elected on whatever franchise might evolve locally. Apart from the addition of Scottish and then Irish Members, after the Acts of Union, there had been no big changes since the end of the middle ages, and none whatever since the reign of Charles II. Thus, by the end of the eighteenth century, there were boroughs where no one now lived - or which had even disappeared through coastal erosion - but which still returned their two Members; and there were new cities, like Manchester, growing up without any representation. In those boroughs which still existed, some allowed virtually every adult male to vote; others confined the vote to a closed corporation. There were "pocket boroughs", where Members could be nominated by a landowner, whose tenants would vote as directed; and there were "rotten boroughs", where the few eligible voters could turn every election into an auction for their votes.

Overall, fewer than five per cent of the adult population had the right to vote. It was possible for great shifts in public opinion to bring corresponding changes at a General Election - as in 1784 or 1830. But the bewildering inconsistency of franchises from one constituency to another meant

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that in ordinary times, the House of Commons only reflected the public mood by accident.

Serious calls for reform had begun in the 1770s, during the debate over the status of the American colonies. The Colonists had demanded “no taxation without representation”. They were told in answer that much of England had no representation, but was still taxed. This failed to satisfy the colonists, and set their English supporters on an examination of home abuses. At first, they had only wanted a modest redistribution of seats. As ever, Bentham and his followers preferred more radical solutions - abolishing the distinction between counties and boroughs, a redrawing of boundaries to equalise representation, and a standardising of the franchise. For them, indeed, Parliamentary reform was to become the means of achieving their vision of a rational, humane, centralised new order.

It would be wrong to suppose that Benthamism and nineteenth century liberalism were identical. They were not. The “philosophic radicals” - as the more ardent followers of Bentham called themselves - despised the Whigs and the moderates in general for their commitment to the past. These in turn were often flatly opposed to the full agenda of reform, entailing as it would a rejection of the Revolution Settlement. But with his writings on legal and administrative reform, Bentham reached out to a large audience. People whose eyes glazed over at the mention of his Panopticon scheme accepted his critique of actual abuses. It was both reasonable and pragmatic - qualities highly regarded in England. And his followers themselves exercised a wide influence over the public mind: George Grote in history, John Austin in law, Samuel Romilly in law reform, Ricardo in economics, the two Mills in philosophy and psychology and just about everything else; and there were many others. They never dislodged the English habit of thinking of liberty as something inherited, rather than as something granted by a sovereign lawmaker. They certainly never gained so complete an acceptance as the Common Law thinkers had. But they did make the old complacency much harder to maintain. Insensibly, they shifted the foundations of English liberalism from reliance on the ancient Constitution to arguments about the utility of limited government.

The unsettling effect of Benthamism was combined with that of the French Revolution. Like the

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rush of water from an unblocked drain, the meeting of the National Assembly led to reform after reform. There was religious freedom and freedom of the press. The administrative map was redrawn on rational principles. The system of justice was entirely replaced. The power of the Monarchy and aristocracy was forever broken. Some English observers came to look on the French as having travelled further towards liberty in two years than they had in two centuries. "How much is it the greatest event that ever happened in the world" said Fox on hearing that the Bastille had fallen, "and how much the best". For Richard Price, Louis XIV was now "almost the *only* lawful king in the world, because the *only* one who owes his crown to the *choice of his people*".⁵⁶ For such people, the Glorious Revolution appeared less as a final settlement than as unfinished business.

Without any further cause, it was inevitable that the Revolution Settlement would be challenged after 1789 in ways that the earlier men of speculation had feared and tried to prevent. In the 1790s, however, the whole timidly liberal consensus of the eighteenth century collapsed in England. The Reign of Terror tore English opinion in two. On the one side, there were the radicals. Had these been only Bentham and his middle class followers, it would still have been impossible to overlook their break with the past. But there was also the emergence for the first time in English history of an autonomous working class movement. The minimal demand within this movement was manhood suffrage, to be followed by legal revolution. An extremist minority was even demanding a copying of the French example - the whole way to regicide and collectivist dictatorship.

On the other side, there were the defenders of the established order. These came quickly to associate any talk of reform with revolutionary violence. Instead of concluding that France was showing what happens when a *régime* resists all change for long periods, and then concedes it all at once out of weakness, they took events there as a warning to stop their own indulgence. Edmund Burke is the standard example of the liberal turned reactionary. In the 1770s, he had supported the American rebels. In the late 1780s, he had made a nuisance of himself to the

⁵⁶ Quoted, Burke, *op. cit.*, p.12.

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authorities though his part in the impeachment of Warren Hastings for misgovernment in India. After 1790, he was known - however unjustly it may be seen in a careful reading of his *Reflections*⁵⁷ - as the supreme philosopher of reaction, his old friends now his bitter enemies, and his old enemies now his adoring friends.⁵⁸

The resulting debate was won by the extreme conservatives. They did not entirely get their way. The press remained free. Juries were often unreliable at returning guilty verdicts in cases of high treason. The Parliamentary opposition functioned unchecked regardless of the country's domestic and foreign crises. But there was a consistent drive to limit the liberties which had been secured in 1688 and widened during the next century. Acts of the period limit the rights of assembly and of speech for the working classes. The Government made furious efforts to suppress public reading rooms, where the working classes would come to read the newspapers and discuss their contents; to sharpen the laws against trade unions; to seek out and punish anyone who published words that might be construed by a Jury as seditious. Letters were opened and read as they went through the Post Office. Spies and entrappers were unleashed on the non-Parliamentary opposition.⁵⁹

⁵⁷ See, for example:

A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve" (Burke, *op. cit.*, pp. 19-20).

⁵⁸ Rather than quote Burke again, I turn to Edward Gibbon, notorious before the Paris mob ran wild as an enemy of superstition and an opponent of the slave trade. Writing in 1791 to his friend Lord Sheffield, who had just spoken in Parliament against abolishing the slave trade, he retracted thus:

In the slave question, you triumphed last session, in this you have been defeated. What is the cause of this alteration? If it proceeded only from an impulse of humanity, I cannot be displeased, even with an error; since it is very likely that my own vote (had I possessed one) would have been added to the majority. But in this rage against slavery, in the numerous petitions against the slave trade, was there no leaven of new democratical principles? no wild ideas about the rights and natural equality of man? It is these I fear. Some articles in newspapers, some pamphlets of the year, the Jockey Club, have fallen into my hands. I do not infer much from such publications; yet I have never known them of so black and malignant a cast. I shuddered at Grey's motion; disliked the half-support of Fox, admired the firmness of Pitt's declaration, and excused the usual intemperance of Burke.

(Letter to Lord Sheffield, 30th May 1792; in *Autobiography of Edward Gibbon as Originally Edited by Lord Sheffield* (1796), Oxford University Press, London, 1907, pp. 277-78).

Thousands, or even tens of thousands, of similar conversions took place within the English political class after 1790.

⁵⁹ For an account of the treason trials of 1793, see Sean Gabb, *Thomas Erskine: Saviour of English Liberty*, "Libertarian Heritage No. 1", The Libertarian Alliance, London, 1990.

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When the great revolutionary panic at last subsided, after 1822, the spirit of the Constitution had been entirely altered. Before 1789, its development had been broadly in line with public opinion. By the 1820s, it had fallen behind. In the 1780s, Parliamentary reform had been on the political agenda; and its only real impediment had been how far to go and how much to spend on buying off the vested interests. Even William Pitt the Younger, while Prime Minister, had introduced a Reform Bill. Forty years later, it seemed to many that the Constitution had been captured by a band of diehard reactionaries, who had blocked every reform to the point where only sweeping changes could bring it back into line with public opinion.

Between the extremes of reaction and remodelling lay the moderate reformers. Perhaps the leading spokesman for this point of view was Thomas Babbington Macaulay. Though willing to agree with Bentham on specific matters, he was deeply suspicious of the main Benthamite project. His attacks on James Mill and the demands for manhood suffrage caused serious damage to that project, and helped push Mill's son, John Stuart Mill, into a nervous breakdown.⁶⁰ Looking beyond the Benthamites, he utterly loathed and feared the socialists, calling them the common enemies of mankind.⁶¹ In every sense, he was a conservative. In literature, he was "the last of the Augustans".⁶² As an historian, he saw his task as explaining the achievements of the seventeenth century Whigs to the readers of the nineteenth. In politics, he was no less conservative. He supported Parliamentary reform because he believed that timely compromise would head off the more radical demands. A generation of Benthamite propaganda and Tory reaction had combined to discredit much of the Revolution Settlement as a mass of abuses. By abandoning the less defensible parts of that Settlement, he hoped that its essentials could be

⁶⁰ The three relevant essays were published in *The Edinburgh Review* - "Mill on Government" (March 1829), "Westminster Reviewer's Defence of Mill", (June 1829), "Utilitarian Theory of Government" (October 1829); all republished in Macaulay (1889).

⁶¹ See his speech in the House of Commons on the People's Charter, 3rd May 1842:

My conviction is that, in our country, universal suffrage [one of the Chartists' demands] is incompatible, not with this or that form of government, but with all forms of government, and with everything for the sake of which forms of government exist; that it is incompatible with property, and that it is consequently incompatible with civilisation.

(Macaulay (1889), p.626)

⁶² See G.M. Young, *Portrait of an Age*, Oxford University Press, Oxford, 1936, p.102.

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preserved. "Reform" he said in Parliament, "that you may preserve...."

[N]ow, while the heart of England is still sound, now, while old feelings and old associations retain a power and a charm which may too soon pass away,... take counsel,... of history, of reason, of the ages which are past, of the signs of this most portentous time.... Save property, divided against itself. Save the multitude, endangered by its own ungovernable passions. Save the aristocracy, endangered by its own unpopular power. Save the greatest, and fairest, and most highly civilised community that ever existed, from calamities which may in a few days sweep away all the rich heritage of so many ages of wisdom and glory.⁶³

At first, the gamble seemed to have paid off. The Great Reform Act had raised immense passions on both sides; and its passing into law had been an overwhelming psychological defeat for conservative opinion. It revealed that there were no untouchable fundamentals in the Constitution; that if the representation could be changed so radically, so in principle could anything else. But there was no forward lunge into remodelling of the sort that many had hoped or feared. The Benthamite agenda was not enacted at full speed into law. Instead, Reform was followed by a return to political stability. Two moderate parties competed for the new middle class vote, with one and now another winning power. Other reforms followed, but came slowly and in an orderly manner.

During the rest of the century, English law and administration were remodelled on broadly Benthamite lines. The Poor Law was reformed. First the town corporations were replaced, and then the county Magistrates were largely superseded, by local authorities elected by consistent franchises. Substantive and procedural law were both reformed, the first in a series of codifying statutes - the Offences Against the Person Act 1861, for example, and the Sale of Goods Act 1893 - the second in the Judicature Acts 1872-76, which replaced the mediaeval jumble of Common Law and Equity courts with the modern hierarchy of first instance and appellate courts applying both systems of law.

Law and administration were both immeasurably humanised thereby. And the reforms were

⁶³ Speech in the House of Commons, 2nd March 1831, Macaulay (1885), p.492.

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carried through mostly in full realisation of the need to hide the fact that things were changing. The Victorians had a genius for hiding novelty behind the appearance of age. Probably not one in a hundred visitors to the High Court in the Strand realises that neither the building nor any of the courts housed there is more than 130 years old. And that has probably been so for the past hundred years. The move out of Westminster Hall and the Judicature Acts were wrenching changes for those who experienced them. But the scars of change were so quickly and perfectly healed. It is the same with the new Royal Family - an ancient institution no older than the 1870s - and most of the customs of Parliament. Even the London railway stations have an air of antiquity about them. On the eve of reform, Lord Eldon had warned: "Touch one atom, and the whole is lost".⁶⁴ For Reade in 1872, reform had been followed by obvious and unalloyed gains.

Even so, the gamble failed. Though concealed so far as they could be, and though their unsettling effects were thereby minimised, the reforms ultimately proved Lord Eldon right. The reformers tried to go carefully, but could not avoid destroying part of the Constitution's hidden rationality. Inevitably, the reforms of the 1830s and 40s included the creation of a civil service.

This has usually been regarded as not merely a necessary but also a good development. W.D. Rubinstein, for example, sees the absence of a civil service before this time as a paradox. The Old Corruption that it replaced was, he says,

pre-modern and non-rational in the Weberian sense of failing to obey the rational criteria of all modern bureaucracies which Weber and other sociologists have distinguished as crucial to, and inherent in, the process of modernization.⁶⁵

And yet,

Britain was unique among European nations in the degree to which it had, long before, rid itself of pre-modern modes of thought and consciousness and adopted... a national mentality of rationalism in Weber's sense and an all-

⁶⁴ Quoted, Rubinstein, *op. cit.*, p.76.

⁶⁵ *Ibid.*, p.65.

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pervasive cash nexus which dissolved all pre-existing bonds.⁶⁶

But there is no paradox. As we have seen, “modernity” - which in this context can be taken as roughly equivalent to liberalism - was the result of administrative paralysis. It was precisely because the English people had no directing, ordering State above them in the seventeenth and eighteenth centuries that they had entered the nineteenth so free and independent. Those European states that came closest to the ideal of “enlightened despotism” - Prussia and the Habsburg Empire, for example - had been fitted out with “modern” bureaucracies powerful enough to keep their subjects in leading strings. England was “modern” not in spite of Old Corruption, but in part because of it.

The prejudice against any form of jurisdiction outside the Common Law prevented the growth of an effective civil service. The lack of an effective civil service then acted in turn as a preventive of such jurisdictions, even when ends otherwise unattainable were strongly desired. Dr Rubinstein himself gives a perfect instance of how the ancient Constitution stifled any reform that needed administrators to give it effect:

Sydney Smith opposed the appointment of factory inspectors [under the Factory Act 1802] because he was sure that, if such were appointed, they would not inspect any factories!⁶⁷

The inspectorships would instead become more sinecures.

Administrative reform removed this preventive. Gradually, the sinecures were abolished. In their place, a new, professional administration was created, with appointment by competitive examination and promotion on merit. The liberal reformers were very proud of this. But they had deliberately given up the rigid defence of the ancient Constitution. Now, they had - mostly without realising - given up the main practical barrier to government activism. They believed that an attack on incompetence and corruption would result in smaller, cheaper government. The

⁶⁶ *Ibid.*, p.71.

⁶⁷ Rubinstein, *op. cit.*, p.83, n.65.

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real effect - not obvious, perhaps, till after the second Reform Act - was to provide what remains the greatest illustration that history affords of public choice economics.

According to James Buchanan and Gordon Tullock⁶⁸, there are forces at work in politics analogous to those at work in economics. Among the most common desires of individuals are wealth and status, usually in some combination. Businessmen in a free market are driven, as if by an invisible hand, to offer new products to their customers, and to cut costs and prices. They do this not because they love their customer, but because this is only way in which they can struggle through to fortune and perhaps a place in the history books. In politics, these things are achieved by gaining and keeping office. This is most easily done in a democracy by promising the electors benefits for which others must bear the costs. These others may be later generations or a minority of the present generation. In either event, the benefits will be offered; and politics becomes a competitive auction for votes with other people's money.

At the same time, the personal interest of most administrators will lie in welcoming and even proposing such schemes, because they must be put in charge of delivering the benefits. This will mean an increase in their budgets, in the number of their subordinates, and in the status that they possess in the public mind.

The public choice trinity is completed by pressure groups. Typically, though not always, these will have a personal motive. Political and administrative reformers nearly always stand to benefit from the adoption of their "reforms". And for all they may celebrate private enterprise in their public utterances, few businessmen really like having to operate in a free market. It means competition in which they might lose, but in which they must always be acting against their own convenience. Even if they are not complete cynics, it takes little persuasion to make themselves believe in "market rationalisation" or "safeguarding the national interest", or whatever. Other things being equal, these groups and their demands will be taken up by the politicians and

⁶⁸ See James Buchanan and Gordon Tullock, *The Calculus of Consent*, University of Michigan Press, Michigan, 1962. See also: Gordon Tullock, *The Vote Motive*, Institute of Economic Affairs, London, 1976; and James Buchanan, *The Economics of Politics*, Institute of Economic Affairs, London, 1978.

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administrators in proportion to how well their schemes require a bigger and more active State.

Quite often, opposition will fail even when what is proposed is not remotely in the public interest as conceived in the wider sense. The reasons for this have been most rigorously explained by Mancur Olson in his writings on collective action.⁶⁹ All voluntary associations involve their members in costs and benefits. When the actual or potential benefits to each member are large, the members will be happy to incur heavy costs. When the benefits to each are small, there will not be the same incentive to incur costs. Typically, producer groups in search of market privilege fall into the first category, and consumer groups into the second. The first will have the money to buy the best and most intensive publicity in favour of their desired privilege. They can hire economists to draw up the relevant graphs or tables of statistics, and to make the worse appear the better case. The second are compelled by lack of finance to reply with general arguments that do not seem actually to address the main points at issue. The first will be helped by politicians and civil servants who see their own interests served thereby. The second can rely, at best, on the support of political outsiders who have no interest in the present state of affairs, but who also have little popular or party support.

Today, examples of how we are ruled by this public choice trinity are beyond counting. Look at the *de facto* marriage between the Ministry of Defence and the arms companies, between the Department of Transport and the road building companies, between the Police and the moral purity campaigners. Look at the rigging of the gas market, at the professional closed shops, at the Common Agricultural Policy. These are marriages obviously against the public interest; but few members of the public have an interest great enough to spend money and effort in trying to annul them. And this process began with the sweeping away of Old Corruption. It cleared the path for the emergence of the boards of public health and public education, of the factory and food inspectorates, of the police forces, and of the municipal enterprises, that by the end of the century had utterly transformed the face of English government.

⁶⁹ Mancur Olson, *The Logic of Collective Action*, Yale University Press, New Haven, Connecticut, 1964, and *The Rise and Decline of Nations*, Yale University Press, New Haven, Connecticut, 1982.

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The most striking difference between the end and the beginning of the century lay in the use of delegated legislation. In 1800, any new powers conferred by Parliament on the authorities were specified in the Act. There was no allowance made for administrative discretion. By 1900, it was normal for powers to be conferred by an enabling Act. Nothing would be specified. Instead, there were phrases such as: "The Secretary of State shall make rules to bring this section into effect", or "in any dispute arising over the exercise of powers conferred by this section, the Minister shall adjudicate; and the decision of the Minister shall not be questioned in any court of law.". For Secretary of State or Minister, read officials. They were silently acquiring the power to make laws, and to enforce or waive these laws as they saw fit. Even in 1888, Maitland was able to tell his students that

[y]ear by year, the subordinate government of England is becoming more and more important. The new movement set in with the Reform bill of 1832: it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.⁷⁰

It must be emphasised that the liberals were entirely to blame for this. There is no point in blaming the avowed statist. These all had some agenda of control. There were the Tory paternalists, wanting a return to a past golden age of deference and protection. There were the militant imperialists, deeply impressed by German collectivism. There were the eugenicists, with their scheme of a master race - in the creation of which the State would stand to its citizens as a breeder stands to his pigs. There were the Christian activists, crying out for the suppression of sin. There were the professional bodies, willing to combine with any movement whatever for the sake of increasing the status and earnings of their members. Later, of course, there were the socialists, with their own plans for big government. But none of these movements, even combined, could have been powerful enough to change the course of English development.

⁷⁰ *The Constitutional History of England*, A Course of Lectures Delivered by F.W. Maitland, Cambridge, University Press, 1908, "Period V: Sketch of Public Law at the Present Day (1887-8), p.501. For a full discussion and attack on the growth of delegated legislation. see: Lord Hewart of Bury (Lord Chief Justice of England), *The New Despotism*, Ernest Benn Limited, London, 1929.

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It is the liberals who did this. By relaxing the old worship of Common Law, and by promoting administrative reform, they untied the straitjacket of the Revolution Settlement.

The case against them is still worse. They could, even so, have prevented the worst effects of the untying; but they failed to do so. Public choice economics is about tendencies, not automatic laws of growth. These tendencies can be checked, and sometimes reversed, by the force of ideas. We have seen how this happened in the seventeenth century. To a limited extent, we can see this in the nineteenth - in, for example, the steady rejection by the authorities of any calls for a return to trade protection. Long after every other great nation had retreated behind a tariff wall, the British commitment to free trade remained unshakable. There was no shortage of special interest groups with money to spend and lies to tell. Every time, they were repulsed by a body of opinion for which tariffs were as abhorrent as Ship Money had once been.

The nineteenth century liberals had an ideology of immense power. The older arguments about the value of free development could now be supported by the discoveries of political economy. Here was an example of spontaneous order. A few psychological and physical laws sufficed to explain the growth of trade and industry without any coordination by the State. The value of letting alone could be shown by arguments from principle as well as from experience. It was the consensus that an economy grew best when left to the laws of the market supplemented by a few obvious human laws against force and fraud. Had anyone challenged him in 1830, Macaulay could have appealed to the whole existing weight of economic science in support of his claim that

[i]t is not by the intermeddling of... the omniscient and omnipotent State, but by the prudence and energy of the people that England has hitherto been carried forward in civilisation.... Our rulers will best promote the improvement of the nation by strictly confining themselves to their own legitimate duties, by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment, by maintaining peace, by defending property, by diminishing the price of law, and by observing strict economy in every department of the State. Let the

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Government do this: the People will assuredly do the rest.⁷¹

But, however powerful, such arguments were blunted by three defects of reasoning:

First, the power of the economic arguments often allowed the others to fall into disuse. They were a deadly weapon against all restraints justified on economic grounds, and only its most famous victory was the repeal of the Corn Laws in 1846. Yet, as a defence of freedom, the arguments from economic efficiency were of little psychological value. Their advocates tended far too often, by ignoring the wider issues of human liberation, to reduce liberalism to a set of prudential warnings about the rate of industrial growth. This allowed a gradual painting of liberalism as a desiccated, calculating ideology that could not be avowed by anyone with a heart. We see this most famously in the works of Charles Dickens. *Hard Times*, he contrasts the neat, philosophic justifications of Ralph Gradgrind for the reality of a Coketown run by the dreadful Josiah Bounderby. “How can one refute a sneer?” it was famously said of Gibbon’s attack on religion. The same could be said of the attacks on “philistine Manchesterism”.

Second, defects in the early theories of value and distribution played straight into collectivist hands. The labour theory of value, found in both Adam Smith and David Ricardo, was taken over by Karl Marx and a legion of - at the time - better-known socialist agitators. By the time Jevons and Menger could introduce the concept of the margin into economics, the harm was done. In any event, later economists tended to drop the habit of writing for the general public. They preferred instead to retreat ever more deeply into a mathematical mode of expression that could be understood only by other economists. Perhaps Mill was the last economist who could be understood by everyone. After him, the public was left to find its economics where it could. Not surprisingly, it came to believe all manner of things about exploitation and the goodness of government action.

Third, the most important liberals of the age never seem to have understood the public choice

⁷¹ T.B. Macaulay “Essay on Southey’s Colloquies” (January 1830), reprinted in his *Critical and Historical Essays*, “Everyman” edition, J.M. Dent and Sons, London, 1907, Volume II, p.224.

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danger they had unleashed. Though more Lockean in their view of individual rights than the Revolution Whigs, they thought they could do without the same uncompromising defence of their ideology. Instead, having created an administrative state, they thought they could pick and choose the objects of administrative action, without regard to the specific precedents thereby set, and without regard to the general dynamics of the new machinery.

This allowed them to make endless exceptions in the ideology of *laissez-faire*. To be sure, it was to be a general rule - but.... Not one of the main classical economists gave an unqualified endorsement to *laissez-faire*. McCulloch, supposedly the most doctrinaire of his school, wrote:

The principle of *laissez-faire* may be safely trusted to in some things but in many more it is wholly inapplicable; and to appeal to it on all occasions savours more of the policy of a parrot than of a statesman or a philosopher.⁷²

This is true. Only an anarchist would deny any place for state action. For other liberals, there must be a formula to allow exceptions. To use the jargon of the law, there are certain state actions against which there should be an irrebuttable presumption - that is, they should never be allowed. Against others, there should be a rebuttable presumption: they should be allowed, but only on proof that the effects of doing nothing would be the greater of two evils. Where McCulloch and the other liberals of his age went wrong was in their standard of proof. The sophistry of the special interest groups is always such that the criminal standard - of proof beyond reasonable doubt - should be adopted. The standard adopted instead was the civil one - of proof on the balance of probabilities. This left the way open for being led to accept a mass of exceptions to the rule until the rule itself was forgotten.

Look again at Macaulay. He understood better than most the risks involved in disturbing the Revolution Settlement and its emphasis on government by Common Law principles. But he was also a strong supporter of limiting hours of work in the factories, of public education, and even of state direction of investment. In 1846, speaking on factory regulation, he commented:

⁷² Quoted, Lionel Robbins, *The Theory of Economic Policy in English Classical Economy*, Macmillan, London, 1952, p. 154.

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Fifteen years ago it became evident that railroads would soon, in every part of the kingdom, supersede to a great extent the old highways. The tracing of the new routes which were to join all the chief cities, ports, and naval arsenals of the island was a matter of the highest national importance. But, unfortunately, those who should have acted for the nation, refused to interfere. Consequently, numerous questions which were really public, questions which concerned the public convenience, the public prosperity, the public security, were treated as private questions. That the whole society was interested in having a good system of internal communication seemed to be forgotten. The speculator who wanted a large dividend on his shares, the landowner who wanted a large price for his acres, obtained a full hearing. But nobody applied to be heard on behalf of the community. The effects of that great error we feel, and we shall not cease to feel.⁷³

The importance of this illustration is that Macaulay may have had a good point. It seems reasonable to believe that the country would have had a better railway network if the Board of Trade had been able to make the same kind of plans as the officials of Napoleon III later made for France. What is missing here is a wider conception of the public interest. Yes, planning would have given us better railways. It would also have added immensely to the prestige of administrative planning. The civil servants and the special interests would have used the precedent as ruthlessly as later in the century they used the precedent of municipal enterprise.

Government grew until the Great War hardly ever by way of denying the truth of liberalism. In almost every case, it grew because of what are now called arguments from market failure. Non-intervention was to be the rule, it was conceded - but not in this case. "The community" needed to be heard against the private interests. Sometimes, as conceded, there may have been market failure. More often, though, it was manufactured and then fed to liberals. It is astonishing how seldom they bothered looking beyond the packaged statistics to the truth. Even more astonishing, outside purely commercial matters, they generally accepted the antithesis offered them - on the one hand of an unreformed State unable to provide education and clean water and policing, and on the other a reformed State that could provide them. They ignored the other alternative that was then available, of private action. They were so thoroughly deceived, it is only since the 1960s that historians have begun to uncover the reality.

⁷³ Speech in the House of Commons, 22nd May 1846, Macaulay (1885), p.719-20.

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Take education. Long before the Education Act 1870, the majority of the people in England had access to at least a basic education. Studying the records of accused criminals committed for trial in the late 1830s, R.K. Webb notes that 44.6 per cent were reported as able to read *and* write.⁷⁴ Of the children maintained in the workhouses of Suffolk and Norfolk in 1838, 87 per cent could read to some extent, and 53 per cent could write. Similarly, in 1840, 79 per cent of mineworkers in Northumberland and Durham could read, and more than half could write.⁷⁵ These figures are taken from surveys of the poorer classes. They compare well with the 1960 literacy figures for Portugal, where less than 60 per cent of the *whole* population could read or write.⁷⁶

There was in England a vigorous and rapidly expanding private market in education for the poorer classes. Aside from those run by the various religious denominations, few schools had anything like a qualified, salaried staff. Instead, they took an endless number of forms - run by retired naval officers, or foreign refugees, or bankrupted tradesmen, or widows. Some taught a full curriculum of studies comparable to that in the old grammar schools. Others taught just basic literacy and arithmetic. Fees varied from a few pennies to a few shillings per week. Parents chose the best education they could afford, moving their children to better schools as these opened or finances improved.⁷⁷ But, without any prompting by the authorities, or help from them, millions of children were receiving an education of sorts before 1870.

After the beginning of state education in 1870, these private initiatives were gradually killed and then forgotten. First, the School Boards were able to offer subsidised education. Then it was made free. Then, in 1891, it was made compulsory. By the end of the century, the huge red brick schools were being built that still punctuate the older districts of English cities. The School Board Man was beginning his war on truancy. The introduction of a standard curriculum and strict - at times overtly military - discipline was creating a generation for whom the horrors of the

⁷⁴ R.K. Webb, "Working Class Readers in Early Victorian England", *The English Historical Review*, 1950 - cited, E.G. West, *Education and the State: A Study in Political Economy*, Institute of Economic Affairs, London, 1965, p.128.

⁷⁵ West, *op. cit.*, pp.129-30.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p.169.

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Flanders trenches were an unpleasant but not unnatural development from their school days.

And the reason why these private initiatives were killed? Because the more statist special interests wanted it that way. The teaching organisations wanted freedom from what they saw as the degrading need to sell their services on the market, and from the need to compete with the unqualified. The Benthamites wanted a centralised and rational system of education in which they could write the curriculum. Others wanted state education because they feared the effects of an expanding working class over which there was no directing moral authority. Since the facts showed no reason to claim that private effort was failing, the facts were simply misrepresented.

The commonest misrepresentation was to assert that the “school age population” consisted of those aged between five and thirteen, and then to show what per centage of children attended “no school whatever”. This could always be used to support claims of national illiteracy, because the average length of schooling for working class children was not eight years, but just under six years.

In 1869, for example, a Government report found that the school age population of Liverpool was 80,000. Of these, 20,000 were not at school. A further 20,000 were discounted on the grounds that they were getting an education “not worth having”. Extrapolated across the whole country, the headline statistic revealed that half the children of England must be growing up illiterate. No one noticed that reducing the assumed length of schooling to 5.7 years produced a school age population of 60,000 in Liverpool - the same number as were attending a school of some kind.⁷⁸ It was this report that propelled the Education Act 1870 to the statute book.

Again, take policing. Most of the submissions to the 1839 Constabulary Report denied the need for a state police force, and expressed satisfaction with the existing means of protecting life and property. The lack of policing by the State before 1829 did not mean the absence of policing. In England, between 1750 and 1850 a network of private law enforcement agencies grew up to

⁷⁸ *Ibid.*, p.146.

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provide services that ranged from the systematic use of newspaper advertising for the return of stolen property, to professional detectives and thief catchers.⁷⁹

A significant contribution was made to law enforcement by private associations dedicated to prosecuting criminals - which was then a private matter. People came voluntarily together to share the costs of prosecution. Between 1744 and 1856 some 450 such associations were set up. By 1830, the larger groups - for instance, the Barnet Association - had effectively become private police forces in their own right, serving communities and responding to local conditions. By no means confined to serving the wealthy, this market-based system proved to be efficient, popular, and responsive to consumer demand.

But Edwin Chadwick, one of the “founding fathers” of the new Civil Service, was responsible for the final draft of the Constabulary Report; and he took care to suppress whatever evidence failed to support his own case for state action.⁸⁰ In the case of sanitation, he not only drafted the final Report in 1842, but had himself appointed Head of the Department set up in consequence of the Report. Because of the lip service paid to liberal ideology, the myth was quietly accepted of a dirty, illiterate, insecure England that had only been rescued by heroic civil servants resisted at every point by the corrupt and the ignorant.

Or look at John Stuart Mill, the “apostle of liberalism”, whose influence on the liberal English mind was second only to Macaulay’s. His service to the cause was decidedly ambiguous. In his essay *On Liberty*, he makes the famous claim that everyone must sometime have read:

[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot

⁷⁹ Stephen Davies, *The Suppression of Public Provision: The Private Supply of ‘Public Goods’ in Nineteenth Century Britain*, “Historical Notes No. 3”, Libertarian Alliance, London, 1988.

⁸⁰ Sir Leon Radzinowicz, *A History of English Criminal Law*, Stevens, London, 1968, Vol IV, pp.259-60.

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rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.^[81]

This is wonderfully eloquent. Paid any close attention, though, it falls immediately apart. Mill's distinction between "self-regarding" and "other-regarding" acts - a distinction seized on by every one of his critics, from James Fitzjames Stephen all the way down to Mary Whitehouse - is an absurd formulation. It even destroys the case for freedom of speech, which is normally supposed to be the one freedom on which Mill is consistent.

The breach in his argument opens at commercial freedom of speech. His distinction of acts lets him proceed to the conclusion that

trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society.... [T]he... doctrine of Free Trade... rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay.⁸²

This in turn lets him flirt with socialism without having to admit its incompatibility with freedom in any normal sense. The flirtation, though, does not end in itself. If I incite or procure you to commit a murder, I can be punished as a principal to the act. There is no difficulty here, and Mill admits none. But suppose I persuade you to drink yourself into alcoholism. You ought not to be punished, for you are harming only yourself. Ought I to be punished, for having advised you to harm yourself? No, he says, for that is a self-regarding act:

⁸¹ John Stuart Mill, *On Liberty* (1859), published with other essays in the "Everyman" edition, J.M. Dent and Sons, London, 1972, pp. 72-73 (Chapter I, "Introductory").

⁸² *Ibid.*, p. 150 (Chapter V, "Applications").

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If people must be allowed, in whatever concerns only themselves, to act as seems best to themselves, at their own peril, they must equally be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions. Whatever it is permitted to do, it must be permitted to advise to do.⁸³

But suppose I am a publican, or have some other financial interest in the sale of alcoholic beverages - does this defence cover advertising? That is an activity intimately connected with trade, and "trade is a social act". Mill continues, with evident perplexity:

The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil. Then, indeed, a new element of complication is introduced; namely, the existence of classes of persons with an interest opposed to what is considered as the public weal and whose mode of living is grounded on the counteraction of it. Ought this to be interfered with, or not?⁸⁴

He devotes a page and a half to equivocation, giving no clear answer. He plainly hates the thought on any limitation on his arguments for freedom of speech, but also wants to leave the way open to some public control of economic activity. But, whatever Mill may have thought of advertising, his chosen distinction between acts has allowed a potential distinction between kinds of speech that can be exploited by anyone who cares to read him.

Or take Walter Bagehot, another of the great Victorian liberals. He is famous for his warnings about the dangers of extending the vote to the working classes - for his fears that democracy would be made the means of a systematic plundering of the rich. Yet near the end of his *English Constitution*, he makes virtually the same point as Joseph Chamberlain about unshackling the State:

One of the most curious peculiarities of the English people is its dislike of the executive government.... By definition, a nation calling itself free should have no

⁸³ *Ibid.*, p. 154.

⁸⁴ *Ibid.*.

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jealousy of the executive, for freedom means that the nation... wields the executive.⁸⁵

And he laughs at the older prejudices:

I remember at the census of 1851 hearing a very sensible old lady say that the 'liberties of England were at an end'; if Government might be thus inquisitorial, if they might ask who slept in your house, or what your age was, what, she argued, might they not ask and what might they not do?⁸⁶

So far as they really believed in a limited state, the mid-Victorian liberals were behaving like the Sorcerer's Apprentice. They conjured up the power to do what they wanted, but they neglected to learn the spell for stopping that power from running out of control.

Now, not every liberal was so ambiguous or foolish. The democratic fallacy was repeatedly exposed. The Liberty and Property Defence League has already been mentioned. Scholars like Chris R. Tame delight in uncovering forgotten liberals of the age who understood exactly what was happening, and who cried out against it.⁸⁷ But this is beside the point. The liberals mentioned above were the influential ones. It was they who were most widely read and admired. It was not their intention. To repeat the point, it was not their immediate achievement: they created the pillars of the Victorian liberalism that Reade celebrated in 1872. But, ultimately, they did all that was required to undermine the conservative foundations on which English liberty had rested for centuries, and to send it sliding into oblivion.

That it has not yet reached oblivion says much for the forces of English conservatism. Even now, those objects of Benthamite scorn - the Monarchy, the House of Lords, and the Established Church - remain unabolished. Even now, the Common Law has not been superseded by

⁸⁵ Walter Bagehot, *The English Constitution* (1867), Fontana, London, 1963, p.262.

⁸⁶ *Ibid.*, pp.262-63.

⁸⁷ When it is published, Mr Tame's *Bibliography of Freedom* will become an instant classic. It lists thousands and thousands of works by liberals that cover every subject. It goes far beyond the Locke-Smith-Bentham-Mill narrative of other writers. A separate work will give quotations from these works, showing how there were liberals who were not fooled by the statist arguments.

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codification. Even now, England remains one of the two or three freest countries in the world, where no one rots in prison merely for having published unpopular opinions, and where the Courts can occasionally hit back at the masters of a Parliament that is now absolutely supreme to do as the placemen who sit there are directed to vote.

Conclusion: The Prospects for Liberty

When John Major became Prime Minister in November 1990, the prospects for liberty in this country had reached what seemed their lowest point short of actual despotism. The Thatcher Government had done much that was good. It had privatised a mass of state assets, and lifted many of the more destructive barriers to enterprise. It had also stopped the steady rise in Government spending as a share of national income. Its achievement was to stop and even reverse the country's relative economic decline. But all this had been accompanied by the shredding of the Common Law and Constitution. Outside those areas of national life seen as economically useful, the State was rolling forward like Juggernaut over his worshippers.

And there was almost no intelligent criticism of this in the media. On the one hand were the socialists, whose loudest complaint was against the Government's positive achievements. On the other were the leaders of the "New Right". The great revival of classical liberalism over the past two decades had thrown up a generation of activists who knew their economic analysis and nothing else. Let the drains be privatised, they argued, and whatever was happening with police powers and legal procedure could safely be ignored. They would have applauded identity cards, so long as the issuing of them were contracted out in the approved manner. The few libertarians who saw the gathering collapse of what remained were confined to small circulation news letters and pamphlets.

However, when John Major left office in May 1997, everything seemed to have changed. The collapse of Communism was breaking down the old categories of left and right; and libertarians from all traditions were beginning to realise that the enemy was neither capitalism nor socialism, but the bureaucratic corporatism of a "New World Order". At the same time, the Internet was

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connecting libertarians and conservatives from all over the English-speaking world. For a long time, the threat had been international. Now, so too was the response. The small newsletters and pamphlets were suddenly reaching an audience of tens and hundreds of thousands. Individuals who had spent their lives raging in silence against the horrors of the age were beginning to find an international voice. Abuses of power that would once have been misrepresented into nothingness by the controlled media were being revealed and discussed without the smallest chance of censorship.

Looking ahead, the growth of the Internet and of strong encryption technology will not merely spread the various messages of anti-authoritarianism, but will also make it possible for individuals to conceal their assets and activities from surveillance. Already, governments are being forced to contemplate a reduction of their activities, as the taxes begin growing harder to collect.

We may stand at the beginning of another cycle of liberty - not just in England, but in all those parts of the world moulded by or settled from England. All this is far too early to say. But one thing is clear. Unless we can understand the ways in which ideology and material forces work together to maintain an establishment, and how the last period of liberalism grew and flourished and decayed, we can expect little permanence for such liberty as circumstances may be about to enable.

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**The Full Coercive Apparatus of a Police State:
Thoughts on the Dark Side
of the Thatcher Decade
3rd May 1989
by Sean Gabb
4,865 words**

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Ten years ago, I gave way to one of my rare bursts of enthusiasm. I was at the time, I'll grant, still a schoolboy; and these things are always more permissible in them than in others. But, even for a schoolboy, it was a very great burst of enthusiasm. I seriously thought that, along with Mrs Thatcher, the second dawn of classical liberalism had arrived. This was it, I thought. No more socialism. No more national decline. No more Road to Serfdom. Oh, even as lads of my age went, I was naive.

To give praise where due, there been a loosing of market forces. Wage and price controls are gone. Exchange and credit controls are gone. There are no controls on foreign investment either way. We have a tax system designed more for collecting revenue than confiscating wealth. Most of the nationalised industries have been sold off, or made to operate on something like sound business principles. Since 1981, we've been unusually prosperous. We even had five years of lowish retail price inflation. The Government's economic record hasn't been one tenth as

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wonderful as I expected, or as I hear it proclaimed. It's been quite good even so. It might easily have been worse.

But the economic record isn't the only test of a government. There are all those rights that don't bring a financial return: how they are respected. And, while the Tories have supervised the building of an impressive number of Japanese car factories here, they haven't rolled back the frontiers of the State. What they have done is bring about an unprecedented concentration of power at the centre. Every one of those bodies, public or private, which used to stand between the state and its citizens has been pushed aside: local government, the press and other media, the unions, the universities - each has been humbled. And the Bar may soon be about to follow.

But all this is common knowledge. Enough already has been said about it. What I wish to do in this article is describe the new and unusual ways in which this concentrated power is being used. I shall discuss to what extent we've ceased being a nation under the rule of law.

Now, this is a grand phrase, and Tory politicians love rolling it out on grand occasions. Nine times out of ten for them, it's just a euphemism for making people do as they're told. Rather, it's the most completely effective check on State power ever yet discovered. Put as fully and exactly as I can, it requires this: that no person be arrested, or imprisoned, or fined, or by any other means harmed, except in accordance with unambiguous laws of general scope, that have been laid down in advance, that are equally binding on all, and that are enforceable only by independent courts in which the prosecution is at a procedural disadvantage. Whoever has not been, or is not in process of being, adjudged in breach of any such law is to be as free of interference by the State as a foreigner living outside its jurisdiction.

The usual objection to this is that it lets crime go unpunished. Everyone knows of some evidently guilty person who's gone scot free thanks to a clever lawyer. But, in judging any set of legal rules, what must be looked at isn't the effect of a single instance, but of the whole scheme through time. Where the rule of law is concerned, it is invariably true that the greater security of life and property, and the readier public acceptance of those uses of power which are

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made, are well worth the occasional specific inconvenience.

I'd be as bad as the people in donkey jackets hawking *Socialist Worker* if I blamed every violation of the rule of law on Margaret Thatcher. Faith in it was already crumbling before her father was a little boy. Nor, in every case, has she been the greatest violator. In respect of the first of these listed below, she's been so far a distinct improvement on Harold Wilson and James Callaghan: she hasn't tried fixing wages and prices by decree. But, taken as a whole, what she and her colleagues have been about these past ten years can have only one meaning. They've been hard at work, freeing the State from all constitutional restraints.

Consider:

In Accordance with Law

In the July of 1988, the Prime Minister was asked in Parliament what she thought of gazumping. In the late 1970s, when making libertarian noises was more to her taste than now, she might have answered that breaches of faith are always regrettable, but what else can one expect when the Government's monetary policy is making house prices rocket? Instead, she called on estate agents to adopt a voluntary code of conduct. If they refused,"the Government might have no alternative but to introduce statutory rules".

I know that estate agents are deeply unpopular. Having been one myself, I know that they're often deservedly so. But this apparently offhand remark is a perfect instance of what Enoch Powell calls "the rule of the Threat of Law". "Do as I tell you" a minister says. "Or I shall make a law compelling you to do it - and then you'll be sorry." Usually, the person threatened does obey. Perhaps he thinks saying "No" isn't worth the effort. Perhaps he'd rather deal with a single minister than many lawyers. Perhaps he thinks the Government has a right to push him around. For whatever reason, he usually obeys.

The estate agents haven't obeyed yet. But the press has long been kow-towing to a D-Notice

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Committee, the orders of which have as much legal force as one of my New Year resolutions. The tobacco companies almost fall over themselves obeying the Secretary of State for Health. Early in 1987, they agreed to cut their advertising budget at sports events sponsored by them from thirty per cent to twenty per cent of the total of any one event. At the same time, they increased the size of the Government Health Warning by fifty per cent.

Calling these agreements voluntary is a sinister misuse of language. Bad in themselves, they form ready precedents for a much larger use of arbitrary power. Compared with what it was, Parliament is a joke. But, it isn't yet entirely a rubber stamp. The Commons do occasionally put the Government front bench in a sweat. The Lords can be very stubborn, even if only for a year at a time. Though we have nothing like the American Supreme Court, the Judges do see off whole Acts of Parliament when the mood takes them. Even formulae like "the decision of the Minister shall not be called into question in any court of law" have been effectively voided. But when the Government can rule simply by stating its wishes and having them complied with, there's an end to all but the most extraordinary scrutiny in Parliament, and of all scrutiny whatever by the Courts. Ministers are freed from worrying whether they're acting *ultra vires*, or in bad faith, or for an improper purpose, or in breach of the rules of natural justice. They can be as selectively indulgent or severe as the whim takes them. With a bit of arm-twisting, with a few nods and winks, safeguards that have taken eight hundred years to evolve can be pushed aside as easily as I delete a paragraph on my wordprocessor.

Laws of General Scope

The rule of law isn't synonymous with freedom. As a doctrine, it governs the making and enforcement of laws, not their content. An Act imposing the death penalty on every person reaching the age of sixty-five would be perfectly compatible with the rule of law. For obvious reasons, Parliament would never make any such Act. If politicians and their friends and relatives were to be exempted, of course, that would be another matter. It would also create privileges decidedly incompatible with the rule of law.

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Except where the revenue is concerned - and this is a cause so lost, I'll not discuss it further - the Thatcher Government has created no explicit legal privileges. But it has made laws, in form binding on all, in essence directed against specific groups. The most scandalous of these, of course, has been section 28 of the Local Government Act 1988. This bans the promotion of the teaching in any schools maintained by it of the acceptability of homosexuality as a pretended family relationship. True, there were Labour Councils pushing the ratepayers' money at any group with the word "gay" in its name. True, this had to be stopped. But why this alone, when there was other political funding besides? What about the funding of anti-smoking groups? These are political. I, for one, find them infinitely more offensive than a few proselytising homosexuals. What, for that matter, about the promotion of knicker sniffing, or any other minority sexual taste that the Labour left might one day care to buy into its "coalition of the disadvantaged". If a law was needed, it should have been a general prohibition laid on the funding of anything controversial beyond a certain point. Instead, a law was made, useless for any other purpose than heaping indignity on an unpopular minority of our fellow subjects.

Laws Laid Down in Advance

The panic following the Hungerford Massacre made a tightening of our gun control laws inevitable. Under the Firearms (Amendment) Act 1988, it became a serious offence to own, among others, semi-automatic rifles and pump-up shotguns. It's a shame the Government gave in so readily to the panic. It's a shame there are any controls at all. But this is beside the point. Taking away the right to bear arms may be oppressive, but it isn't in itself contrary to the rule of law. Under section 21 of the Act, the Home Secretary was enabled to make a scheme of compensation for those surrendering or otherwise disposing of their newly prohibited weapons. Delegating legislation is politically dangerous, but, again, not contrary to the rule of law. Under the scheme eventually made there was to be a flat payment of £150 per gun, or a payment of fifty per cent of the average retail price of the gun in the summer of 1987. Taking property without just compensation is theft. But this I deal with below. For the moment, I'll discuss sections 21 (a) and (b) of the Act. These provide for compensation only to those owners who lawfully acquired, or contracted to acquire, their guns before the 23rd September 1987. The Act

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was passed in the spring and summer of 1988. Possession of the weapons prohibited under it became an offence on the 30th April 1989. No one who bought any such weapon between the 23rd September 1987 and last Sunday - as I write - was breaking the law. Anyone who did buy one has been punished as if he had.

When laws can be made tomorrow that penalise what was lawfully done yesterday, there's an entire end to limited government. The only safe course lies in anticipating what may be said, and doing it. As above, if by other means, the distinction between the law of the land and what the government wants is abolished. This much the Home Office cheerfully admits. It was known long in advance, we've been told, that certain weapons were likely to be banned. Anyone who didn't immediately take account of this has only himself to blame.

Laws *ex post facto* are expressly forbidden under Article I, 9:3 of the American Constitution. It used to be assumed they were equally unconstitutional here, whatever the theoretical right of Parliament to make them. The modern view is made quite plain in section 139 of the Criminal Justice Act 1988. This mainly does something rather nasty that I shall discuss below. Subsection (8), however, reads: "This section shall not have effect in relation to anything done before it comes into force". What a splendidly cool admission of the coming tyranny!

Laws Enforceable by the Courts

There's an old parliamentary device called Attainder. It's a means by which penalties - sometimes death, sometimes a fine - can be imposed without due process of law, the Bill going through Parliament like any other. Naturally, it was a device shockingly abused from beginning to end. It hasn't been used in centuries. Yet if section 21 of the new gun law isn't in effect a little Act of Attainder, I don't know what is.

The Local Government Finance Act 1988 is the one forcing the Poll Tax on us. When I first learned I was to be put against my will on a computerised register, I couldn't believe I was awake and living in England. But, again, this is only frighteningly oppressive and politically

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stupid. Giving false information to the people compiling these registers is an offence, carrying fines that range from £50 to £200. Under section 23 and Schedules 3 and 11 of the Act, these fines are to be imposed by tribunals set up by the authorities collecting the Tax. Though a tribunal may at any time quash or amend its sentences, there is to be no automatic right of appeal to the proper courts. Anyone who doesn't supply every last detail wanted by the registration officers has been made subject to the penal jurisdiction of a town hall committee. But this jurisdiction will at least bear some resemblance to legal proceedings. There is worse.

Under section 27 of the Transport Act 1982 - given effect in the summer of 1986 - the Police are empowered to hand out fines to motorists whom they believe to have been speeding or committing some other traffic offence. The money involved is negligible - £24 at the most. The principle is a disgrace. Penalties are now imposed without the ghost of due process. I'm told that, in many European countries, the Police have still wider judicial powers: they even collect the fines. But there hasn't been a properly limited government anywhere in Europe since the middle ages. Foreigners are so used to misgovernment, it's no surprise if they stand by grinning while their wallets are gone through by men in uniform. What they're willing to put up with is no precedent for us.

Prosecution At A Procedural Disadvantage

One of the acknowledged glories of the common law tradition is its procedural safeguards in criminal trials. An accused person is presumed innocent until found guilty. The Court is forbidden either to rely on involuntary confessions or to construe silence as an admission of guilt. In the absence of a truly voluntary confession, the prosecution must make out its whole case without assistance. Any other evidence offered by it must have been obtained without general searches or other means contrary to right or custom. For at least the graver crimes - and preferably in any matter affecting life, liberty or property - trial must be by independent Jury of the Accused's peers. I can't say that these safeguards were still securely in place before 1979. The cumulative growth of executive and, especially, of Police power has already largely eroded them. But it is true that the past ten years have seen a revolution in criminal procedure.

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Consider again:

Innocent Until Proved Guilty

Section 1 of the Drug Trafficking Offences Act 1986 brings into English law the penalty of the Criminal Confiscation Order. Someone is found selling heroin, and is arrested, tried and convicted according to law. Trying to stop the sale and use of recreational drugs is oppressive in that it isn't called for on the grounds of individual or public justice. It's also dangerous by reason of the subsidy it places on all real criminal activity. But, as with the possession of weapons, this has nothing directly to do with the rule of law. It's what now follows conviction that is so outrageous. The Court may direct an inquiry of the Defendant's assets insofar as these may be the fruits of the crime of which convicted or any other similar crime and exceed £10,000. The prosecution submits a statement of assets, particularising those which it alleges to have been come by dishonestly. It's up to the defence to challenge each of these allegations. If it fails to challenge them, or doesn't challenge them to the Court's satisfaction, the assets are confiscated.

Except that the courts administer it, this is as gross a denial of due process as any of those listed above. Taking away the proceeds of what may well be, but haven't been properly decided, criminal acts is nothing but a kind of judicial attainder. Leaving all challenges to the defence is an exact reversal of the traditional burden of proof. Everyone knows the advantage of this in ordinary argument. A clever flat-earthier stands up in company. "The earth is flat" he asserts. Someone laughs. "Prove to me that it isn't" he demands. On the defensive, he has to prove nothing himself, but only to deal with individual - and perhaps half-baked - objections. In court, it makes the job of prosecution so delightfully easy, that no one but a fool can have believed the procedure would remain confined to drug offences. Section 71 of the Criminal Justice Act 1988 extends it to cover every indictable offence.

Section 139 of this Act creates the new offence of having a knife in a public place without "good reason or lawful authority". This does away with what now evidently seems the cumbersome requirements of section 1 of the Prevention of Crime Act 1953, whereby the prosecution was

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put to the inconvenience of proving that any knife found was indeed an offensive weapon within the meaning of the Act, or was carried with intent to commit a crime. Now, it merely needs prove possession in public of a sharp or pointed implement that isn't a folding pocket knife with a blade of three inches or less. This done, it's up to the defence to prove "good reason or lawful authority".

The Prevention of Terrorism (Temporary Provisions) Act came into force last March 15th. Section 9 makes it an offence to handle money for any person, "knowing or having reasonable cause to suspect that it may be used by that person for the purposes of terrorism". This offence carries an unlimited fine or a sentence of up to fourteen years in prison. Murder, theft, intimidation - these are offences that ought probably to carry the same penalties whatever the motive behind them. But, in any case, someone who knowingly transfers or helps to transfer funds for the commission of a crime should be regarded as an accomplice, and so liable to be punished. What, however, do the words "reasonable cause to suspect" do except make a crime of stupidity? If an English bank clerk quietly takes in money for an American group called Kill A Brit For Ireland Inc., maybe he is assisting in the commission of a crime. Caught taking in money for the Patrick Sarsfield Foundation, he's in serious trouble unless he can prove his ignorance of Irish history.

This bizarre provision isn't the effect of sloppy drafting. It's deliberate Government policy. Said Douglas Hogg, justifying it in the Commons: "My feeling is that to accept an exclusionary subjective test ... would be to erect too high a hurdle for the purposes of securing convictions". It used to be a boast of the common lawyers that the purpose of English law was to secure justice, not convictions. Better that ten guilty men go free, said Blackstone, than one innocent be made to suffer. I believe I could quote Mr Hogg's own father to the same effect.

No Self-incrimination

The Police don't often beat confessions out of suspects. They don't often need to. At most, a few veiled threats are enough. Usually, all that's needed is sustained questioning of a suspect,

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alone and in the unfriendly surroundings of a Police Station. What is required, then, is that no one should be questioned without access to legal advice. In America, the courts regularly throw out indictments where the Police haven't observed this requirement to its letter. Here, section 58 of the Police and Criminal Evidence Act 1984 does give an arrested person the right to consult a solicitor at any time. But, in the case of "serious arrestable offences", this right can be deferred for up to 36 hours; and the whole period of questioning between arrest and before any charge must be made can be extended to 96 hours.

A member not merely of the Bourgeoisie, but arguably also of the Establishment, I rather hope I'd be treated with the fullest, wariest respect if ever arrested. For all the Act lays down, others haven't been so lucky. In 1985, following the Broadwater Farm riots, a boy of thirteen was interrogated alone in a Police Station for three days. Wearing only underpants and a blanket, he eventually confessed to murder. He might possibly have been guilty. But the judge was so aghast, he felt he had no choice but to direct an acquittal. This, however, was a use of discretion, not, as in America, the application of a fixed rule. For lack of one, it stands to reason the Police will go on pressuring suspects too young or ill-informed to be worth being frightened of.

The Right to Silence

There is an essential part of the foregoing. Just as a suspect traditionally can't be pressured into giving evidence against himself, neither does he have to risk being duped into doing so by skillful examination. Nor can his remaining silent be construed as any admission of guilt. I treat this separately, however, by reason of the current debate over its continuance.

There have been periodic clamours against the right for twenty years. It lets sophisticated criminals get away far too often, we're told. But this is the first Government to act on the clamour. In 1988, an Order was laid before Parliament allowing the Judges in Northern Ireland to make what they pleased of a suspect's silence under prior interrogation or in court. From extended Police questioning to plastic bullets, there's little tried in Ulster that doesn't eventually

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find its way to England. It's only ever a matter of time and opportunity.

In one part of the law, indeed, the right has already been lost in England. Under section 1 of the Criminal Justice Act 1987, the Serious Fraud Office was set up. Section 2 of the Act allows this body to require a person under investigation for serious or complex fraud, or any person who is reasonably thought to have information relevant to such a fraud, to attend before it and answer questions or furnish information. Anyone failing to comply commits an offence. Though statements made under compulsion can be used only to contradict other statements made later by the defence in court, documents surrendered may be used by the prosecution for such purposes as it may think fit. The writers of the standard commentary on this Act - Emmins & Scanlan, p. 6 - are driven to say: "Thus significant inroads are made on the privilege against self-incrimination and the maxim that 'no one shall be required to be his own betrayer'."

No General Searches

The Fourth Amendment to the American Constitution is a codification of English law as stated in the various cases connected with John Wilkes. I cite the whole Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

I cite the relevant parts of section 19 of the Police and Criminal Evidence Act 1984:

The powers conferred by subsections (2), (3) and (4) below are exercisable by a Constable who is lawfully on any premises.

(2) The Constable may seize anything which is on the premises if he has reasonable grounds for believing

(a) that it has been obtained in consequence of the commission of an offence; and

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(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed ...

(3) *The Constable may seize anything which is on the premises* if he has reasonable grounds for believing

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed....

(5) The powers conferred by this section are in addition to any power otherwise conferred.

Beyond saying the italics are mine, I don't think I need point out anything further here. Looking at these two documents one after the other, I'm left speechless. This second is the modern law of England.

Means Contrary to Right Or Custom

If I testify in court, I do so under two great sanctions. First, I swear by my God or my honour, whichever I decide the greater, that I will tell the truth. Second, if caught lying, I face being prosecuted for perjury. The assumption behind this first is that I understand the difference between truth and falsehood. That behind the second is that I can be held legally responsible for what I say. Section 34 of the Criminal Justice Act 1988 provides that an accused may be convicted on the uncorroborated evidence of an unsworn child. Perhaps, as was extensively argued at the time, children are less prone to telling lies than was always assumed. Certainly - and I don't recall this being mentioned - they can, with complete personal impunity below the age of ten, have someone convicted of what are currently viewed as the most atrocious of crimes. They don't even need to appear in court, but can say all they need over closed circuit television. It was Esther Rantzen and her friends in the gutter press who demanded this denial of natural justice. But it was the Government that willingly gave in to it.

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Trial by Jury

This Government doesn't like Jury trials. The bloody nose it got in the Ponting trial has kept it out of the criminal courts as much as possible ever since. Also, while it didn't begin the progress towards the abolition of Juries, it has done much to hasten its speed.

1. Sections 37 and 39 of the Criminal Justice Act 1988 have made theft of a motor car and common assault and battery offences triable by magistrates alone. The excuse given for this was that Crown Courts were too overloaded for there not to be a certain shedding from the list of indictable offences. Between 1979 and 1984, we were told, indictments rose by 48 per cent. But this wasn't the only answer to the problem. There were at least two others. The first was to stop creating so many new offences. The second was to build and staff more courts. This would have been expensive. But what is expense to a Government that takes and spends upwards of £150 billion every year? If the Department of Trade and Industry was allowed to spend £13 million last year on what was essentially Conservative propaganda, what is the objection to giving a few dozen million extra to the Lord Chancellor's Department? Which is a more basic function of the State - financing Lord Young's vanity or providing justice?

2. Section 118 of the Act abolishes the right to peremptory challenge in Jury trials. Much was said last year about how careful challenging could alter the composition of a Jury in favour of the defence - as if this were anything new and unnatural. Under the old common law, an accused had the right to challenge thirty-five Jurors without showing cause. Anyone who has looked into Howell's *State Trials* will know how extensively this right was used in the 17th and 18th centuries. It was there to ensure a more subtle and reliable fairness in the composition of a Jury than could be achieved by the means of showing cause to the Judge. To be fair, the right had already been substantially taken away. The number of peremptory challenges was reduced to twelve in 1925, to seven in 1948, and to three in 1977. But it has fallen, as ever, to this Government to take the decisive step, and reduce the number to zero. The prosecution, of course, keeps its old right of unlimited peremptory challenge.

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Conclusion

If anyone wants to contest this, I'm open to argument. I really would like nothing more than to believe I'm hopelessly in the wrong and that we are returning to those values which - far beyond any mere expansion of territory or power - set this country apart from all others. But I don't think I can be accused of having misunderstood the drift of things. Whatever was promised, whatever may now be said, the Thatcher Government has brought into being the full coercive apparatus of a police state. As yet, this has had scarcely more to do than stand in reserve. Prosperity and a lingering habit of obedience have kept us sufficiently governable. But let either of these falter, and then, in their regular, familiar use, we shall see the potential of the new powers made actual.

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Reflections on the Criminal Justice and Public Order Bill

**“Anthony Furlong and Edward Hume”
(by Sean Gabb)
3,469 words**

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Introduction

When this Bill was first published earlier in the year, we read it in a mood of astonished horror. If ever passed, we assured each other, it would mark a significant step from the remains of liberty to a police state. It would be the most oppressive Act of the most oppressive Government this country has known since 1688.

We now have before us the Bill as amended on Report. Published this 12th July, it is the version that will go for Royal Assent. It has in some degree been softened during its passage. Its bulk has even been partly offset by the welcome, if timid, lowering of the age of consent for homosexuals, from 21 to 18. Nevertheless, for all the changes great and small that have been made since its first publication, the Bill remains as astonishingly horrible now as it was last January.

At 211 pages inclusive of Schedules, the Bill contains so much objectionable matter that we cannot hope to cover all of it in this short article. We will instead concentrate on three particularly ominous measures. These are: the abolition of the right to silence, the perversion of due process in terrorism cases, and criminalising the possession of pornography.

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One: The Abolition of the Right to Silence

This right comprises the following:

1. At the moment of arrest, a suspect must be cautioned by the Police as follows: “You have the right to remain silent, but anything you do say will be taken down and may be used in evidence against you”. This caution must be repeated in similar form at the police station every time he is questioned. If he decides to remain silent under questioning, no compulsion may be used against him. Nor may his having remained silent be later revealed in court.

2. This right extends from the police station into court. An accused person cannot be compelled to give evidence, or to submit to any cross-examination. If he decides to fall or throughout to remain silent, the prosecution is allowed to make no comment whatever.⁸⁸ The Judge is allowed to comment, but if he does, he must remind the Jury that failure to testify cannot be regarded as evidence of guilt.⁸⁹

Because in many cases evidence of guilt is something that emerges under police questioning, this right has long been unpopular among those who claim to stand for “law and order”. It has been called an accidental right. Much has been said of its allegedly recent origin, and of how unconnected it is to the general body of legal protections.

Much has also been said about its abuse by hardened criminals. We are told that, disturbingly

⁸⁸ See the Criminal Evidence Act 1898 s.1(b):

The failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution.

⁸⁹ On this point, see the following *obiter* guidance given by Lord Chief Justice Parker:

...the accepted form of comment is to inform the jury that, of course, he [the accused] is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box.
(*R v Bathurst* [1968] 2 Queens Bench 99, pp. 107-08)

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often, the Police will arrest someone who is manifestly guilty, but who escapes conviction because he refuses to answer questions in the police station, and only speaks out after he and his lawyers have made up enough lies to convince a Jury.

And so, in the Bill, the right is effectively abolished. Clause 34 states:

(1) Where in any proceedings against a person for an offence, evidence is given that the accused -

(a) at any time before he was charged for the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on for his defence in those proceedings;
or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed...

(2)...

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

Clauses 36 and 37 allow the same inference to be drawn from failure to explain any objects found on a suspect's person at the time of arrest, and to explain why he was in any place when arrested. Clause 35 allows the Court or Jury to draw inferences from an accused person's refusal to testify or to answer questions.

We will note that these Clauses have been softened since their first publication. In their original version, the Judge was even to act as inquisitor during a trial, calling on a silent accused to speak in his own defence. It says much about our democracy that it was the Judges in the House of

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Lords who forced this to be taken out.

The claims made to justify this part of the Bill are so much nonsense. There is nothing accidental or contingent about the right to silence. It follows naturally from the privilege against self-incrimination, which is perhaps the most distinctive feature of English criminal law. In our own law, the privilege is so old that it vanishes into the mists of time. In the United States and in every civilised Commonwealth country, it is an entrenched constitutional right.⁹⁰ Its justification is that it compels the authorities to go out and look for objective evidence of guilt, and not rely on tricked confessions of guilt.

Here, it is worth pointing out that there is no evidence that the right has been abused in the manner claimed. It is, however, common knowledge that confessions unsupported by objective evidence are unreliable. The past generation has seen a whole series of cases, beginning with *Confait*, in which the use of unsupported confessions has resulted in gross miscarriages of justice. If there is any case for amending the right to silence, it is for expanding its scope, by disallowing the use of unsupported confessions.

It is no argument to say against this that the right has not been abolished, but instead only that in future the Court or Jury may draw inferences from its exercise. Strictly speaking, this is so. According to Clause 35(3):

This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

⁹⁰ See, for example, the Fifth Amendment to the American Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself* [our italics], nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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But, in all but the written word, the right has been abolished. It is the refuge of any suspect who fears that he may be pressed into making ill-considered statements after arrest, or in response to aggressive questioning. The knowledge that a use of the right may be regarded as evidence of guilt is as near its abolition as may be made without the positive legalising of torture.

Two: The Perversion of Due Process in Terrorism Cases

Clause 82 of the Bill amends Part IVA of the Prevention of Terrorism (Temporary Provisions) Act 1989. The sections relevant to our present investigation read as follows:

16A. - (1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies....

(3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above.

The maximum penalty for this offence is imprisonment for ten years or a fine or both.

Now, again, the scope of this Clause has been greatly limited since we first read it last January. The limitation is contained in 16A(2):

The acts of terrorism to which this section applies are -

- (a) acts of terrorism connected with the affairs of Northern Ireland; and
- (b) acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland.

However, as with the abolition of the right to silence - made for Ulster in 1988 - oppressive laws made for one part of the United Kingdom have a habit of being extended to the other parts. We are glad that this particular law is not at least for now intended for Great Britain. But, whether

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or not it is ever extended, we find it perhaps the worst Clause in the entire Bill. Our objection is on two grounds:

First, it makes a crime of being merely suspected. Let us suppose that our Editor - who, for all his unionist sympathies and lack of specific interest in Ulster, has an Irish Catholic name - should be sent a review copy of *The Poor Man's James Bond* by Kurt Saxon.⁹¹ Now, this is a book that describes, among much else, how to make bombs and other weapons. It is clearly an article within the terms of the Clause. Let us suppose that the book is found in Mr Gabb's possession by a Policeman. Here is what seems to us suspicion that it is "connected with the commission, preparation or instigation of acts of terrorism" in Ulster. There is no need to prove that he has the smallest criminal intent. The fact that he may be reasonably suspected is be made a crime in itself.

Of course, half an hour in a police station will be enough for Mr Gabb to clear himself of suspicion. But here is the second ground of our objection: that the burden of proof has been reversed. In this case, the presumption of innocence does not apply; and, if he is for whatever reason unable or disinclined to prove that "at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above", then he may find himself in very serious trouble.

This is not an isolated instance of the perversion of due process. It is, sadly, becoming a normal mode of legislating for Ulster. For example, Section 9 of the 1989 Act makes it an offence to handle money for any person, "knowing or having reasonable cause to suspect that it may be used by that person for the purposes of terrorism". This offence carries an unlimited fine or a sentence of up to fourteen years in prison. We ask - What do the words "reasonable cause to suspect" do except make a crime of ignorance? If an English bank clerk quietly takes in money for an American group called Kill A Brit For Ireland Inc., maybe he ought to be accused of

⁹¹ This book is published by Loompanics Unlimited, an advertisement for which appears elsewhere in this journal. It is available for \$17 plus 12 per cent postage and handling charge. As ever, this journal's policy of not breaking or advocating any breach of the law compels us to advise those Ulster residents who may be interested in this book to buy it before the Bill passes into law.

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assisting in the commission of a crime. Caught taking in money for the Patrick Sarsfield Foundation, he is in serious trouble unless he can prove his ignorance of Irish history.

Perhaps the courts can be trusted to throw out frivolous or vexatious charges. But this is not the point. It is our repeated experience that many laws allow the authorities to harass or destroy people without going to the trouble of bringing them into court. It will be remembered how the search and seizure powers of the Customs Consolidation Act 1876 were used against Gay's the Word bookshop in 1984. Property was seized. Charges were laid. Although the case was dropped before it could come into court, the bookshop was almost driven out of business by the defence and associated costs of the action. Less famously, the journalist Al Baron received similar attention last year, when his computer and papers were seized and held for nine months until the Crown Prosecution Service dropped the charges for lack of any answerable case against him.⁹²

We will say emphatically, that we abhor the terrorist violence connected with Ulster, and desire that the firmest action be taken against the Republican and Loyalist terrorists - but only so far as is consistent with a maintained rule of law. The present Clause does not meet this requirement. It is simply another set of excuses for state harassment.

Three: Criminalising the Possession of Pornography

Section 1 of the Protection Act 1978 reads:

It is an offence for a person -

- (a) to take, or permit to be taken, any indecent photograph of a child (meaning in this Act a person under the age of 16); or
- (b) to distribute or show such indecent photographs; or

⁹² For details, see Chris R. Tame and Sean Gabb, "Al Baron and Freedom of Speech: An Argument in Two Parts", *Free Life* No. 19, November 1993.

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(c) to have in his possession such indecent photographs, with a view to their being distributed or shown by himself or others; or

(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs, or intends to do so.

Section 160(1) of the Criminal Justice Act 1988 amends this Section by adding that

It is an offence for a person to have any indecent photograph of a child (meaning in this section a person under the age of 16) in his possession.

Clause 84(2) of the present Bill further amends the 1978 Act as follows:

In section 1 (which penalises the taking and indecent photographs of children and related acts) -

(a) in paragraph (a) of subsection (1) -

(i) after the word “taken” there shall be inserted the words “or to make”, and the words following “child” shall be omitted;

(ii) after the word “photograph” there shall be inserted the words “or pseudo-photograph....

The wording of the other paragraphs of the 1978 and 1988 Acts is similarly changed to reflect the creation of the new offence.

Section 7(5) of the 1978 Act is amended to read as follows:

(6) “Child”, subject to subsection (8), means a person under the age of 16.

(7) “Pseudo-photograph” means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.

(8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that

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some of the physical characteristics shown are those of an adult.

In this Clause the laws of Scotland and Ulster are also amended to the same effect.

Those of our readers who have read the lengthy quotations above will have noticed the creation of three offences.

The first, created in 1978, is, in our view, entirely acceptable. Children enjoy, and always have enjoyed, a separate legal status under the laws of every civilised country. This is on account of physical and intellectual immaturities that we do not need here to describe. Children are not allowed to do many things that either are or ought to be permissible for adults. Being induced to pose for “indecent” photographs is one of these things.

Prohibiting the distribution of such photographs we also believe to be justified. What photographs people look at is, of course, their business - but only so long as the models cannot be said to be harmed by being identifiable, which is plainly the case with children

It may be argued against us that the 1978 law was made in response to a moral panic over the alleged activities of the Paedophile Information Exchange, and that it only criminalises acts that were already criminal under the Obscene Publications Act 1959. This is true. But, since we believe that the 1959 Act should be repealed, the 1978 Act is only what we should like to see preserved from the general repeal.

The 1988 Act, however, goes further. By criminalising the *possession* of such photographs, it creates an entirely new and undesirable offence. We will say that what someone has for his own use - however it got there - is not a proper subject for legal control. As said, child models may be harmed simply by being looked at. But the risk of any potential harm here is outweighed in our view by the actual harm done to adults. This harm is the wide power given to the authorities of supervision over our libraries. This establishes a principle that we are quite certain will be sooner or later be applied for further supervisions that will be made for what we consider to be

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trifling or even bad ends.

Not only does the present Clause go still further, it also loses sight of the what we consider to be the justifiable ends of the 1978 Act, which is the protection of children. A pseudo-photograph need not involve the use of any child in its creation. It may be generated wholly from an artist's imagination, or from photographs of adults.

Of course, there are people who claim that the use of children as models for such photographs is not the only evil involved. Further evils are said to be the encouraging of sexual violence against other children, or the private corruption of adults who enjoy looking at such photographs, or both. We will not argue this point. We will say only that the private effect on adults of looking at any pornography is their business alone; and we have yet to see any evidence whatever that the availability of child pornography leads automatically to the committing of assaults on children. It may suggest the pleasurable of assaults - just as *The Bible* may have suggested the murder of prostitutes to Peter Sutcliffe, or as the works of Karl Marx and Adolf Hitler certainly encouraged mass-murder and the enslavement of millions. But here, as with any political or religious text, the answer is not to suppress the prompting text, but to punish the prompted person for his actions.

The natural end of the present Clause is not the protection of children, but the criminalising of masturbation - and not only of masturbation over pictures of children. It will be seen that a pseudo-photograph is defined to include one "where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult". Much pornography now fully legal even in this country - which has by far the most restrictive laws in Europe - includes photographs of models dressed in white ankle socks or school uniforms, or with shaven pubic hair. Is all this now to be made illegal? God help us!

Conclusion

As said, the above does not by any means exhaust our objections to the Bill. There are hundreds

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of other objections that we could make. We can only ask how much of this will be brought into effect, and how much will be struck down by the European Court? We will also ask - and invite our readers also to ask - whatever next? For there are worse proposals floating around - enough to keep Parliament busy well into the next century. Is this Bill to be the last and heaviest belch of authoritarianism? Or has the main course yet to begin?

We wish that we could say otherwise, but we do very much suspect that the latter is the case.

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Sado-Masochism and the Law: Consent versus Paternalism by “Anthony Furlong” (by Sean Gabb) 5,798 words

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The laws of God, the laws of man,
He may keep that will and can;
Not I: let God and man decree
Laws for themselves and not for me;
And if my ways are not as theirs
Let them mind their own affairs.
Their deeds I judge and much condemn,
Yet when did I make laws for them?
Please yourselves, say I, and they
Need only look the other way.

A.E. Housman, *Last Poems*, XII

“Over himself, over his own body and mind, the Individual is sovereign”

J.S. Mill, *On Liberty*, “Introductory”

“‘Ello, ‘Ello, ‘Ello...”

SOME TIME IN 1989, while leafing through their copies of the *Gay Times* and *Euroboy*, the officers of the Metropolitan Police Obscene Publications Squad came on an unusually interesting advert. It is, of course, their job to check into these things. They are paid to stamp out any but the mildest hint of sexual enjoyment. It is, of course, in their interest to do their job well. Even in

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these days of AIDS and incurable herpes, it is on the whole safer to persecute sexual nonconformity than to go looking for real criminals. There is less chance of a violent reaction. There is more chance of public approval. Unless they have done something extraordinarily bad, thieves and murderers quite often find more sympathy than condemnation in the courts. But prostitutes and pornographers are guaranteed a bad reception. They are usually convicted. They are always pilloried by the gutter press. The officers who go after them are not ordinary policemen. They are the upholders of public morality. By both politicians and the media they are treated with the kind of deferential respect that your ordinary PC Plod only receives when a rioting mob cuts his head off. On this occasion, they had found an advert promising the ultimate in depravity and corruption to anyone who would reply to it. It was time to launch "Operation Spanner".

This went well from the start. At first, indeed, the officers thought they had hit the absolute jackpot. A videotape fell into their hands. It showed scenes of unimaginable violence and perversion. Men were hung up by chains and beaten insensible. Hooks were pushed deep into flesh. One man had a nail hammered through his foreskin. The actors ran about, dressed variously as schoolboys and officers in the SS. A dog was sodomised. All this was set to a soundtrack of Gregorian plainchant. This, the officers told each other, was surely a "snuff" video - a horror film where there are no special effects, but the participants really are tortured and killed. The moral purity fanatics had been claiming these things to exist since the 1940s. So far, not one had ever come to light. Now, it seemed, one had.

The search ended in Shropshire, in a country house shared by Ian Wilkinson, aged 56, a forester, and Peter Grindley, aged 41, a care assistant in a home for the mentally handicapped. The officers took dogs with them, to help search for bodies buried in the garden. No bodies were found. But there was no need for disappointment. Instead, they had uncovered the biggest homosexual vice ring in British history. The house was fitted with a spacious and exceptionally fine torture chamber. Men would go there and torture or be tortured all the way to orgasm. And, since this was the 1980s, they could relive their experiences afterwards by watching them at home on videotape.

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Some of the men, moreover, were living double lives. They were married or had girl-friends. Some were even very well- to-do. There was an international lawyer with limited diplomatic immunity. There was a missile designer with security clearance. There was a lay preacher - whom, as a matter of interest, I used to know in my days as an estate agent. There were the makings here, the investigating officers knew at once, of a real scandal. All they had to do was come up with a reason for making arrests.

The Offences

There was, it must be admitted, ample reason. Homosexual acts are illegal in this country, unless between two consenting adults who have reached the age of 21 or over and who act in private.⁹³ The presence of a third party - or even the commission of the act in a place to which third parties lawfully have access - is deemed to render such an act public, and the participants liable to imprisonment for up to two years. Bestiality - that is, to have carnal knowledge of an animal to the extent of penetration - is an offence carrying a maximum penalty of life imprisonment.⁹⁴

Youths below the age of consent had taken part in a few of the orgies. One of them was aged 15. Sodomy or gross indecency with a male under the age of 21 carries a maximum penalty of five years.⁹⁵ As with animals and women, sodomy with a boy under the age of 16 carries a maximum penalty of life imprisonment.⁹⁶

Other offences had been committed. The house had been made into a brothel - into premises habitually used or resorted to for the purposes of prostitution or for lewd homosexual practices. It is no defence to prove that no public nuisance was committed, or that no money passed hands. This offence carries a maximum penalty on summary conviction of three months' imprisonment,

⁹³ By s.13 of the Sexual Offences Act 1956, as amended by s. 1 of the Sexual Offences Act 1967.

⁹⁴ The penalty under common law was death until 1861. The current law is contained in s 12 (1) of the SOA 1956: "It is an offence for a person to commit buggery with another person or with an animal".

⁹⁵ S.3 SOA 1967.

⁹⁶ See Note 2 above.

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or six months on a second conviction.⁹⁷

Indecent and obscene material had been published. Again, it is no defence to prove that no money was had in exchange. Publication, or possession with intent to publish, is sufficient. The maximum penalty is six months' imprisonment on summary conviction, or three years' imprisonment on indictment. As an alternative or in addition, unlimited fines may be imposed.⁹⁸

Some of the material included pictures of the 15-year-old boy. It is a summary offence, carrying a maximum sentence of six months' imprisonment or a £2,000 fine, to take or to possess an indecent photograph of a young person who is or who appears to be under the age of 16.⁹⁹

Some of the material had been sent through the post. This, again, is an offence. On summary conviction, it carries a fine of £1,000, and on indictment a maximum of 12 months' imprisonment.¹⁰⁰

At least one of the accused was charged with the possession of illicit drugs. The gravity of punishment for this offence depends on the type of drug possessed, and on the possessor's further intentions regarding its use.¹⁰¹

At least some of these are crimes that ought not to exist. So long as there is no public nuisance, I see no reason whatever why the authorities need to bother themselves over homosexual orgies that only involve consenting adults. Bestiality should not be an offence unless it can be shown to have caused pain to the animal. The same argument applies to pornography. Children should be excluded. Animals should be protected. Beyond that, the only proper grounds for constraints

⁹⁷ Ss.33-36 SOA 1956. For the definition of homosexual brothel, s.6 SOA 1956.

⁹⁸ S.2 Obscene Publications Act 1959.

⁹⁹ Protection of Children Act 1978, as supplemented by s.33 Criminal Justice Act 1988.

¹⁰⁰ S.11 Post Office Act 1953.

¹⁰¹ S.5 Misuse of Drugs Act 1971.

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on publication are those having as their end the avoidance of public affront. Our drug laws are a disgrace to civilisation. They allow the State to stand over the citizen as a father stands over his children. They put a bounty on organised crime. They divert resources from the one legitimate function of the State - the protection of life and property.

As I have already indicated, I do believe that there should be an age of consent. I reject the extreme libertarian argument, that children are entitled to the same rights as adults. Even so, the current age of consent for homosexuals, at 21, is at least five years too high. It certainly ought to be consolidated with the heterosexual age of consent, at 16. Both might even be brought down by a year or so. This is no radical suggestion. In France, the age of consent for all sexual activity is already 15. In Italy, it is 14. In Spain, it is 12.¹⁰²

But, while this may be worth saying, it is a digression. The officers had found evidence that crimes had been committed. It was their undoubted duty, whatever nasty pleasure can be imputed to their doing it, to make their arrests and leave the Crown Prosecution Service to do the rest. This they did. I may think the Obscene Publications Squad a pack of fascist goons who ought to be sacked, or sent en masse into the next race riot. But they did nothing unusual. They acted entirely within the letter and spirit of laws not made by them. What makes the case of *R v Wilkinson & Ors* so memorable is what the lawyers did with it.

The Trial

Of the 43 men investigated, 15 were eventually brought to trial, charged among much else with various crimes under the Offences Against the Person Act 1861. To this part of the indictments the defence put in a plea of consent. The essence of such crimes is that injury is inflicted on an unwilling victim. Since here there had undeniably been full consent, these charges would have to fail. Not so, said the Judge, Mr James Rant QC:

¹⁰² Source: Peter Tatchell, *Out in Europe: A Guide to Lesbian and Gay Rights in 30 European Countries*, Channel Four Books, London, 1990, pp 18-19.

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Much has been said about individual liberty and the rights people have to do what they want with their own bodies, but the courts must draw the line between what is acceptable in a civilised society and what is not. In this case, the practices clearly lie on the wrong side of that line.¹⁰³

These acts, he continued, were peculiarly degrading and vicious. Mr Michael Worsley QC, for the prosecution, agreed, adding that the case went far beyond what the law allowed in that it involved “the violent and deliberate inflicting of injury and pain on human beings often to the point of real torture”. It involved “brute homosexual activity in sinister circumstances about as far removed as can be imagined from the concept of human love”.¹⁰⁴

Some of the seized video tapes were shown. After one of them, white in the face, the Judge ordered an adjournment. He later said: “I am not likely to forget that one. No one would”.¹⁰⁵

The Sentences

Their sole grounds for defence cut away from under them, all 15 defendants pleaded guilty. They were sentenced, on the 19th of December 1990 as follows¹⁰⁶:

Ian Wilkinson, for keeping a disorderly house and causing actual bodily harm, was jailed for three and a half years.

His accomplice, **Peter Grindley**, for the same offences and for possessing drugs, was also jailed for three and a half years.

Colin Lasky, 46, a computer operator of Pontypridd in Glamorganshire, for causing or aiding

¹⁰³ *The Times*, 20th December, 1990.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ The following paragraphs are compiled from *The Times* (20th December, 1990) and *The Daily Telegraph* (21st December, 1990).

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and abetting actual bodily harm and possessing an indecent photograph of a young person, was jailed for four and a half years.

Graham Cadman, 52, an ice cream salesman of Bolton in Lancashire, for keeping a disorderly house and taking and possessing indecent photographs of a young person, was jailed for four and a half years.

Anthony Brown, 54, a retired local government officer of Yardley in Warwickshire, for assault and aiding and abetting assault, was jailed for two years and nine months.

Roland Jaggard, 42, a missile design engineer of Welwyn Garden City in Hertfordshire, for actual bodily harm, was jailed for three years.

Saxon Lucas, 57, a restaurateur and lay preacher of Evesham in Worcestershire, for actual bodily harm, was jailed for three years.

Donald Anderson, 60, a retired pig breeder of Hartford in Carmarthenshire, for keeping a disorderly house to which people came “to take part in acts of sadistic and masochistic violence and accompanying acts of a lewd, immoral and unnatural kind”, was jailed for 12 months. His plea of not guilty to buggery with a dog and donkey were accepted by the court.

John Atkinson, 48, an antiques restorer and restaurateur of Broadway in Worcestershire, for aiding and abetting others to cause injury to himself, was given two years’ probation.

Christopher Carter, 37, a fancy dress hire proprietor of Shrewsbury in Shropshire, for aiding and abetting actual bodily harm, was jailed for 12 months, suspended for two years.

Christopher Zimmerli, 51, a lawyer of Haverstock Hill in London, for actual bodily harm, was jailed for 12 months, suspended for two years.

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John Lofthouse, 49, a retired fire officer of Lowestoft in Suffolk, for causing or aiding and abetting actual bodily harm to another and to himself, was jailed for 21 months, suspended for two years.

Anthony Oversby, 56, a tattooist of Bayswater in London, for offences not disclosed in my newspaper reports¹⁰⁷, was jailed for 15 months, suspended for two years.

Albert Groom, 55, an hotel porter of Thornaby-on-Tees in Yorkshire, for conspiracy to send indecent photographs through the post, was given a conditional discharge.

Graham Sharp, 41, a photographic developer of Coalpit Heath in Gloucestershire, for sending indecent material through the post, was fined £1,000.

Paul Kelly, 23, of Horwich in Cheshire, for aiding and abetting Graham Cadman to keep a disorderly house, was given a two year conditional discharge earlier in 1990.

“Operation Spanner” had entirely succeeded. The Obscene Publications Squad even managed to get a word in about the evil trade in pornography and its “snuffy” tendency. According to the main report in *The Times*,

Det Supt Michael Hames, head of Scotland Yard’s Obscene Publications Squad, said after the trial that sadistic pornography was becoming more bizarre, more violent and more widespread. He issued a warning that it would eventually lead to a death being filmed.¹⁰⁸

¹⁰⁷ He may be connected with Alan Oversby, who runs a tattooing and body piercing business in Central London under the name of Mr Sebastian. For a full account of the ancient and interesting art of body piercing, see: V.Vale and Andrea Juno, *Modern Primitives: An Investigation of Contemporary Adornment and Ritual*, Re/Search Publications, California. 1989 - available from the Virgin Megastore in Oxford Street for £12.95.

Mr Oversby was also tried before Judge Rant in the December of 1989, for the crime of having unlawfully wounded a client whose penis he was engaged to pierce. His plea, that the client consented, had a predictably frosty reception, on which he pleaded guilty. He also admitted charges of unlawfully administering an anaesthetic and sending obscene material through the post. I have yet to discover what sentence he received.

¹⁰⁸ 20th December, 1990.

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Now, compare these above sentences with the following:

On the 13th of November, 1990, a lorry driver who killed two people, when he crashed into their parked car after fumbling for his tobacco pouch on the floor of his cab, was sentenced to 90 hours' community service and disqualified from driving for two years.¹⁰⁹

On the 30th of August, 1989, an admitted thief and fraud, who had stolen nearly £350,000, of which about £50,000 was recovered, was put on probation for two years. Since his arrest, the accused had converted to Christianity, and was now sorry for his offences.¹¹⁰

But I am missing the point. These were only crimes against life and property. Messrs Wilkinson et al. had committed crimes against morality. There is no comparison. Any one of us might for some reason kill or rob another person. But to commit a sexual offence - especially a homosexual offence - why, that requires a particularly revolting turn of mind. It is, both legislators and public agree, the business of the law to suppress that sort of thing. Whatever else it may become, England shall not be allowed to become another Sodom or Gomorrah.

The Law Relating to Consent

The various offences relating to unlawful sex and publication and possession of drugs have already been mentioned. The law regarding them may be grossly immoral in its paternalism. But it undoubtedly is the law; and the "Shropshire 15" might have found their interests better served by paying attention to it. What may surprise the average reader is the strange ability of the courts to construe a sexual act between consenting adults as a criminal assault. Indeed, John Atkinson was convicted solely of having aided and abetted others to cause injury to himself. It must certainly have surprised the convicted men. Yet Judge Rant's decision was by no means based

¹⁰⁹ *The Daily Telegraph*, 14th November, 1990.

¹¹⁰ *The Daily Telegraph*, 31st August, 1989.

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purely on his own prejudices. It is open to the Court of Criminal Appeal, or the House of Lords, to rule that his interpretation of the law was incorrect. Yet there is some reason for holding that, when two sado-masochists make love, they are committing a serious offence.

As has already been said, it is the essence of a crime against the person that injury is inflicted contrary to the will of the victim. This is the admitted assumption of the law. Consent is a valid defence; and it is for the prosecution to prove its absence.¹¹¹ It is not, however, a defence in every case. There are circumstances in which a plea of consent will be rejected by the courts.

There is fraud. If you consent to my injecting a vaccine into your body, and I instead inject a useless irritant, I shall very likely be guilty of battery. It is the same if I lie to you that I am a qualified dentist and unnecessarily pull out one of your teeth. Fraud will negative consent where the injured party is deceived as to the identity of the person or the nature of the act.

There is duress. If I hold you prisoner and will not release you unless you consent to have sexual intercourse with me, your consent will not be recognised by the courts; and I shall be guilty of rape or an indecent assault. There is doubt as to the amount of duress required to negative consent. It is thought that if I merely threatened to dismiss you from my employment, or to bring a prosecution against you - both lawful acts in themselves - I might still be guilty. The probable test to be applied is whether, having regard to the gravity of the threat and the proposed act, the will of a reasonably firm person is likely to be overcome.

There is the incapacity of minors. Some years ago, a defendant tattooed boys aged 12 and 13, and they suffered injury as a result. Although they had consented to be tattooed, the court decided that they were too young to understand the nature and likely consequences of the act to which they had submitted. the defendant's plea was rejected.¹¹²

¹¹¹ *R v Donovan* [1934] 2 King's Bench Reports 498.

¹¹² *Burrell v Harmer* [1967] Criminal Law Reports 169, together with the printed commentary.

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Finally, there is the public interest. There are supposed to be certain classes of act which the State ought not to allow, irrespective of whether the parties have given their fullest and most informed consent. It is for the defence to prove that the act in question falls into one of these categories.

Now, this goes far beyond the two other limitations described above. Those are quite compatible with the right of adult individuals to do with their bodies as they will. They operate only where, on account of the circumstances of the injured party, consent cannot be taken as genuine. This, however, allows the fullest public supervision of private actions. There has never been a comprehensive definition of the concept. Instead, it is for the judges to decide whether any particular class of acts is in the public interest. It is for them, consulting their own sense of right and propriety, to decide what we may do with ourselves and each other. It is their prejudices, and not an objective, logical rule, that are allowed to define the limits of our freedom.

Take, for example, the case of sporting injuries. Prize fights are not in themselves illegal in England. But they have nearly always been held by the courts to amount to batteries. Yet boxing matches held in accordance with the Queensberry Rules have not. Both have entertainment value. Both involve considerable danger of injury or even death to the participants. But only the dangers in the former have been held to be too great for the public interest to be served by their toleration. As Mr Justice Cave said just over a century ago:

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with...ferocity and severe punishment to the boxers.¹¹³

A professional boxer may consent to have his brains knocked out in the ring, so long as the customary rules of conduct are observed. That is in the public interest. It is a different matter if

¹¹³ *R v Coney* (1882) 8 Queen's Bench Division 534.

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those rules are not observed. If two people outside a legitimate boxing ring black each other's eyes, at least one of them commits an assault. In 1980, two youths decided to settle their differences by finding out which had the harder fists. One got a bloody nose a few bruises. The victor was charged with assault occasioning actual bodily harm, but was acquitted by the jury. The Attorney General referred the points raised in the case to the Court of Criminal Appeal for clarification. He was answered thus:

...It is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent....

[Yet n]othing that we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a lawful right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.¹¹⁴

Their Lordships mention "reasonable surgical interference". The test of what is reasonable is, again, what they consider to be right and proper. If my legs are so badly mangled in an accident that my life is endangered, I may consent to having them cut off. The preservation of my life, I am sure, would be held to be in the public interest. But, if, like one of the characters in Peter Greenaway's *A Zed and Two Noughts*, I had one leg cut off merely for aesthetic reasons, to balance the earlier loss of the other in an accident, my surgeon might well find himself in trouble. That degree of body modification might offend the Judge. He might not think that to be at all in the public interest.

On a similar point, see Lord Denning 40 years ago, commenting on the legality of an hypothetical vasectomy:

¹¹⁴ *Attorney General's Reference* (No. 6 of 1980) [1981] 2 All England Reports 1057.

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When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation is then plainly injurious to the public interest.¹¹⁵

At the time only *obiter dicta*, this particular point is now obsolete. The National Health Service (Family Planning) Amendment Act 1972 authorises the performing of vasectomy operations for contraceptive purposes. But the passage is still important. It shows the inevitable bias of judicial reasoning when such a vague and illimitable concept as the public interest is received in the courts. There is no other guide available than the judge's own conscience. Lord Denning is a moderate Anglican. His church by then had accepted the propriety of contraception for certain reasons, but still condemned promiscuity. Had he been a Catholic, he might have taken a more restrictive view. Had he been a follower of D.H. Lawrence, he might have been considerably more liberal. The concept has been less vague in practice than it might have been only because most of the other judges have been moderate Anglicans, and have come from much the same background as Lord Denning. The concept remains manageable only because the number of views as to its meaning have been limited by the facts of judicial selection.

Not surprisingly, the bias against sexual nonconformity retains all its old force. The intentional infliction of bodily harm is a criminal offence unless the injured party consented, and unless the injury falls into a class of actions considered to be in the public interest. It is for this reason that Judge Rant was able to dismiss the pleas of consent with his words about drawing the line "between what is acceptable in a civilised society and what is not". It is for this reason that 14 of the Shropshire 15 were punished for beating each other up. It is for this reason that John Atkinson, the 15th, was punished for letting himself be beaten up: he was an accessory to an assault. It is for this reason that the law ought to be changed.

¹¹⁵ *Bravery v Bravery* [1954] 3 All England Reports 59.

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A Proposal for Reform

The Government has recently introduced a Criminal Justice Bill into the House of Commons - the third mass of substantive and procedural changes in four years. Most of the changes in this Bill, as in the previous two Acts, are decidedly for the worst.¹¹⁶ But, whatever else it contains, a Criminal Justice Bill is just the place for amending the law relating to offences against the person. To any Member of Parliament who may be interested in the extension of individual freedom, I offer this draft clause for inclusion in the Bill:

Where, in any prosecution for a non-fatal offence against the person, the consent of the injured party shall be pleaded for the defence, that plea shall be adjudged a full defence unless it shall be proved for the prosecution in rebuttal

(1) that such consent was not given, or was obtained by fraud or duress;
or

(2) that the injured party was at the time of giving such consent
below the age of 18; or

(3) having regard to the gravity of the injury, or to the probable mental state of the injured party at the time of consent, or to both, that the form in which such consent was given was not sufficiently clear to sanction the injury.

A Brief Commentary

This amendment, I hope, is sufficiently clear not to require any long commentary. But there are a few points that might benefit from a further discussion.

¹¹⁶ See *The Guardian*, 29th December, 1990. Clause 25 reclassifies solicitation by a man, the procuring of homosexual acts and indecency between men as "serious" sexual offences. These acts ought not even to be against the law. They are directed against neither life nor property. In those cases where they may cause a public nuisance, the police are already able under the general law of the land to take action. Now they are to stand beside indecency towards children and indecent assault.

I have little time for homosexual activists. For the most part dullard socialists, they spend far too much of their time crying out for grants of public money and the suppression of what they barbarously call "homophobia". Nevertheless, when they begin their campaign against Clause 25 of the Bill, they will be absolutely in the right. They will deserve - though they may not be clever enough to welcome - the support of all libertarians.

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I specify “non-fatal” offences. I believe that euthanasia ought to be legal. At the moment, to assist someone to put an end to his life is a serious offence. To aid, abet, counsel or procure the suicide of another person carries a maximum penalty of 14 years’ imprisonment.¹¹⁷ If that person is unable to do more than plead for death, to grant his plea is to risk an indictment for murder, which carries a maximum penalty of life imprisonment. What I shall want when my time comes I am unable to say. But I will maintain that I have the right to end my life in the manner of my choosing. If I am diagnosed early enough as suffering from a painful and fatal illness, the law places no impediment to my committing suicide.¹¹⁸ Why, if I delay until I am too feeble, can I not be helped by another, or simply appoint another to dispatch me?

The prohibition of euthanasia is yet another example of moral paternalism. It is to be condemned on exactly the same grounds as the prohibition of sado-masochism. But I have drafted an amendment to a Parliamentary Bill, not a philosophical text. There are probably more Members in favour of legalising what they may never have noticed was a crime than for legislating on a subject that has been hotly debated for years.

For the same reason, I take 18 as the age of majority. I have already said that I would see the age of consent lowered. There is a good case for drawing a single line between childhood and adulthood some time about a person’s 16th year. But this, again, is a controversial point. I am at the moment interested in a single reform of the law.

In sub-clause (3), I give a formula for deciding the reality of consent. This may not be in the ideal form. It may require elaboration. But something like it is undeniably necessary. If I go into a tattooist’s parlour, and ask to have a skull and crossbones put on my chest, it is perfectly reasonable to assume that I know what I am asking for. I am an adult of sound mind. I ought to

¹¹⁷ S2 Suicide Act 1961.

¹¹⁸ Before the Suicide Act 1961, it was a felony at common law for a sane adult to commit suicide. The penalty was forfeiture of goods and exclusion from consecrated ground. Failed suicides were guilty of the misdemeanour of attempted felony, and was liable to imprisonment. For a good account of how suicide was regarded throughout Europe until the middle of the last century, see W.E.H. Lecky, *History of European Morals from Augustus to Charlemagne* (1869), Longmans, Green and Co., London, 1911, Volume Two, pp 43-61.

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know what a tattoo is, how it might hurt, how difficult it might be to remove. My consent may be taken as indicated by my saying what I want and removing my shirt and vest.

Suppose, on the other hand, I asked for a "Prince Albert" - that is, to have a steel ring put through my glans. Now, this is an extremely painful operation. It can take months to heal. It is also a dangerous operation. If the cavernosum is pierced, the whole member may need to be amputated. At least this latter fact is not common knowledge. It might, therefore, be well for the piercer to explain what I was asking for, and have me sign a consent form in which I acknowledged my understanding and acceptance of the risks involved. It might be well in addition for the piercer to check that I was sober and otherwise of sound mind.

For some more drastic modification, he might be advised to have my consent form witnessed by a third party. Whatever complexity may be needed in practice, the principle is simple. The more extreme or unusual the act that I required, the more explicit must be the evidence of my real consent to it. If that is what I want, I am to be allowed to have myself hung up on hooks and flogged within an inch of my life. My consent is to be a full defence to any charge of assault or battery. But the person who has injured me must have a good counter-rebuttal prepared to any attempted rebuttal of my consent by the prosecution.

CONCLUSION

It is frequently said that the modern Conservative Party believes only in economic freedom. It has lowered taxes. It has lightened the vast burden of public restraints on enterprise. It has on the whole resisted calls for protectionism. But it has done this, we are told, not out of any commitment to the principle of individual freedom - only for the sake improving the performance of Great Britain plc against that of its main rivals.

This may be true of some Conservative Members of Parliament. But it is untrue of other Members. It is most emphatically untrue of John Major, our Prime Minister. His belief in freedom goes far beyond any mere interest in economic efficiency. At the heart of his philosophy,

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he says, is a determination to

reinstate the individual to his or her rightful place in society. To offer him new incentives and opportunities to use his initiative. To deploy his talents. To demand something of him. To enable him to achieve something for himself and his family. And to take control of his own life....

[The role of government] is to take the steps which will enable people to help themselves. Left to their own devices, people will create a spontaneous, well-ordered society....

Our appeal is unashamedly populist. Quite simply, it is that people know best. That they should choose for themselves, and not have the choices made for them by politicians, self-styled experts, or, for want of a better word, the establishment.¹¹⁹

These sentences are worthy of John Stuart Mill. If my amendment is ever put before the house, I confidently trust that Mr Major's vote would be no less worthy.

¹¹⁹ From a speech given to the Radical Society in late 1989 - quoted, *The Sunday Times*, 2nd December 1990.

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Gun Control in Britain by Sean Gabb 4,873 words

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On Wednesday the 19th August 1987, an unemployed Hungerford labourer named Michael Ryan, armed with a semi-automatic rifle, and in a mental state unknown to us, went through his home town, shooting anything that moved. He shot and killed 14 people., including his mother His suicide a couple of hours later, and the subsequent deaths of two of the 16 wounded, brought his total to 17.

Such killings being a rarity in England, their effect was tremendous. Every small detail of the event was collected and printed; and, when the stock of true details ran low, tabloid imagination supplied the lack. A fund was set up for the survivors or the victims' next of kin. Within a few weeks it had raised £380,000.¹²⁰ Yet, with curiosity and sympathy, perhaps no other emotion competed for primacy in the public mind so strongly as determination. The Hungerford Massacre, it was resolved, should not be repeated. And, as though the one naturally followed the other, the cry went immediately up for a tightening of the law controlling guns.

“The existing legislation is wholly inadequate ...” said the General Secretary of the Police

¹²⁰ *The Times*, 31st August 1987.

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Superintendents' Association. "There are too many guns in circulation and a lot of people who have guns clearly should not be in possession of them."¹²¹ Stephen Waldorf, perhaps, might agree with this. So might the relatives of Cherry Groce.¹²² But whatever may be thought of their speaker, the words themselves only expressed the general belief regarding firearms. Stricter controls were essential, it was agreed, if criminal shootings were not to become part of the normal run of things. Such was the opinion six months ago. Reinforced since by a spate of armed robberies and killings with shotguns, such remains the opinion now. "Weapons should be kept under conditions so secure as to exclude most householders from keeping them" wrote *The Times*.¹²³ Indeed, the latest Gallup Poll on the issue reports public favour at 75 per cent for the banning of all guns from private ownership.¹²⁴ Leave aside the efforts of some Conservative backbenchers, and of all the measures likely this year to have the Royal Assent, possibly none will have had so easy and uncontroversial a passage as the Firearms (Amendment) Act.

Yet for all its lack of controversy, the Bill is easily the most illiberal measure of this entire long parliamentary session.¹²⁵ For legal access to firearms is already strictly and comprehensively limited. The "wholly inadequate" current legislation already forbids the public to own automatic weapons.¹²⁶ Everything else, excepting shotguns, which have a less restrictive form of control - and the most feeble airguns - requires a Firearms Certificate, which is had from the local Police and is renewable every three years. On it must be recorded all transactions in weapons and ammunition. Applicants must satisfy the Police of their "good reason" for possessing any certifiable weapon, and that they can be trusted with it "without danger to the public safety or to

¹²¹ *The Times*, 22nd August 1987.

¹²² These were innocent British citizens set upon and shot in error by the police during the 1980s. There have been many others, but these are the most notorious cases.

¹²³ *The Times*, 16th October 1987.

¹²⁴ *The Daily Telegraph*, 10th February 1988. It should be noted that the poll was commissioned by the League Against Cruel Sports, and that none of the questions asked was published in my source.

¹²⁵ See the Bill reviewed in *Policing London* for December, 1987, produced by the Police Monitoring and Research Group of the London Strategic Policy Unit (a major part of the GLC's ghost).

¹²⁶ Firearms Act, 1968, s 5.

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the peace”.¹²⁷ “Good reason” is normally held to be membership of an approved shooting club, or use of land not open to the public - but not, at least since 1946, self defence.¹²⁸ Forfeit of a certificate can result in loss of all firearms held.¹²⁹ Unauthorised possession is a serious offence, bringing a penalty of three years imprisonment, or an unlimited fine, or both.¹³⁰ There is a penumbra of controls in other statutes which, taken entirely, might seem already to discourage all but the most determined from lawfully keeping guns. Despite all this - despite levels of control comparable to those in Rumania on typewriters - more is following. Some of the Bill’s harsher clauses have subsequently been softened.. Not all semi-automatic rifles and pump action shotguns will be prohibited, as was at first intended. Nor are weapons to be taken without compensation. But certain kinds of shotgun are to be made fully certifiable, and access to other kinds restricted. There are still more than a million certificate holders in this country. They are nearly all peaceful and responsible citizens. The new Act, when passed, will yet more limit their right to lawful enjoyment of an activity quite as popular as any better known sport.

But the rights of sportsmen, though important, are not all that are threatened. There is the matter of our constitutional rights - those famous Rights of Englishmen, which have been the crude matter from which every liberal doctrine has been refined, and possession of which we trace back into the mists of time. To bear arms is one of those rights, and the one with which the others have repeatedly been protected. To go back only to the Revolution, it is specifically affirmed in the Bill of Rights,¹³¹ and one of the grievances against James was that he had caused “several good subjects, being protestants, to be disarmed ...”¹³² A disarmed people was believed a sure

¹²⁷ *Ibid* 27 (1).

¹²⁸ Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales*, Routledge & Kegan Paul, London, 1972, p.92. This is one of the great classic texts on the right to keep and bear arms. It is cited continually throughout this pamphlet. I make no apology for this. Mr Greenwood’s book repays the most thorough and continual study.

¹²⁹ F.A., 1968, ss 51 & 52.

¹³⁰ *Ibid.* ss 3 (3), 51 (1), (2) & Schedule 6, Part 1.

¹³¹ Bill of Rights, 1689, S II (7) - “That the subjects which are protestants may have arms for their defence suitable for their conditions, and as allowed by law”.

¹³² *Ibid.* I (6).

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sign of approaching or actual tyranny, and Gibbon, in the next century, only voiced the general prejudice in declaring that

[a] martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince.¹³³

For centuries there has been no good reason here for pulling down a government. The right to bear arms for personal defence was nonetheless jealously preserved, and still exercised into a time almost within living memory. Ninety years ago, it was possible for anyone in this country, regardless of age or capacity, to walk into a gunsmith's and buy as many guns and as much ammunition as he could afford. Since no effort was made to count the number of guns in circulation, numbers are uncertain. But over 4,000 imported pistols and revolvers were submitted for proof at the Birmingham Proof House in 1889; and 37,000 British pistols were submitted in 1902. Price was no constraint on ownership: pistols of a kind started at 1s 6d,¹³⁴ or eighteen times the cost of a daily newspaper. There was, it should be said, Section 4 of the 1824 Vagrancy Act, which penalised the carrying of offensive weapons with intent to commit a felony. There was the Gun Licenses Act of 1870 - despite its name a revenue measure requiring a 10s license to be taken out before any kind of firearm could be carried or used outside of a private dwelling. Licenses were available without question at all Post Offices. These restrictions aside, guns could be had as readily and legally as television sets can today.

Quite obviously, the mere assertion of rights is no defence of them; and it would be a very feeble case against gun controls that rested here. The function of constitutional rights is to safeguard freedom, the function of which in turn is to allow the pursuit of happiness - however this may be conceived. There is no value in calling for rights which, if had, would frustrate this purpose, or which would give more freedom than is compatible with its own survival. Certainly, they are not to be interfered with for any light, transient reason. Neither, though, are they to be enjoyed

¹³³ Edward Gibbon, *History of the Decline and Fall of the Roman Empire*, Chapter III - last sentence of first paragraph.

¹³⁴ Greenwood, *op. cit.*, p.26.

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absolutely, without regard for circumstances. Freedom of speech, for example, is one of the essential doctrines of liberalism; yet no liberal of any common sense would press equally hard for it in every instance. There are places where the open discussion of certain matters would produce not the elimination of error but bloodshed on a massive scale. Even in this country, there may be some danger that too much flaunting of blasphemy might provoke an otherwise indifferent majority to censoring the press. When therefore the exercise of any one right seems to endanger the continued exercise of others, or of itself in a milder form, its curtailment becomes a proper matter for thought.

Now, perhaps the individual owning of guns is another such instance. There were few controls in the last century because few were required. But the present age is believed more violent than any before it. There has been both an increase in the effectiveness of most weapons and an increasing willingness to use them; and new threats to public safety call for new forms of protection. On this point, Peregrine Worsthorne draws an ingenious analogy with the road traffic laws - superfluous once but now essential.¹³⁵ No one can know for certain what would happen without controls; but American experience is normally taken as a good indicator. There, despite some controls, guns are to be had virtually on demand, the murder rate is regularly almost ten times that of England and Wales, and more than three fifths of all murders are committed with

¹³⁵ *The Sunday Telegraph*, 27th August 1987.

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guns.¹³⁶ Three Presidents have been shot this century, two of them fatally. And even stockbrokers have not been immune from the anger or disappointment of an armed public. Perhaps, without what controls we have, armed violence in England might increase to similar levels. Or fears for life and property might even cause a lapse into a simpler, and more despotic, form of government and justice. For avoiding either of these, the limiting of freedom involved in gun controls is generally thought well worth the price. Put forward as it is with great frequency and unanimity, the argument does have an appearance of plausibility. Critically examined, however, it is found to rest on a number of false assumptions. First, most obvious and most easily exposed, there is the belief that gun controls were put on in response to a need for them. Almost the exact opposite is true.

Though guns were freely available, the late Victorians seem to have been anything but careless or violent in their use of them. According to Coroners' reports, in the three years from 1890, there was a total of 524 deaths attributable to firearms. 443 of these were suicides, which, being voluntary matters, are not our concern. This leaves 49 accidental deaths and 32 homicides. Accidents are not presently our concern, involving as they often do self-inflicted harm. This leaves an average of 10 instances per year of the lethal misuse of guns.¹³⁷ Regarding their more general use in armed crime, not much can be said owing to a lack of continuous statistics. But,

¹³⁶ **Murder Rates Per 100,000 - Various Countries**

		1976	1977	1978	1979	1980
U.S.		9.1	9.2	9.4	NA	NA
ENG. & WALES	1.1	0.9	1.2	1.1	0.8	
SWITZERLAND	0.9	0.9	0.7	0.9	NA	
N IRELAND		13.7	14.3	5.7	NA	NA

Source: *Statistical Abstract of the United States: 1982-3*, Washington D.C. 1982, Table 297.

Murders in U.s. - Per Cent Rate Guns and Knives

YEAR	MURDERS	GUNS	per cent	KNIVES	per cent
1970	13,649	66.2		17.8	
1975	18,642	65.8		17.4	
1980	21,860	62.4		19.3	
1981	20,053	62.4		19.4	

Source: *Ibid*, Table 298.

¹³⁷ Greenwood, *op. cit.*, p.22. Despite ignoring accidents, I cannot help relating that, in 1892, accidental deaths due to misuse of pistols were just three more than those due to misuse of perambulators (*ibid*).

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in the nine years to 1889, 13 police officers were wounded by armed burglars in the Metropolitan Police District. During the next five years, three were so wounded in the whole of England and Wales, an area with a population five times larger. In the earlier period, 18 burglars escaped by using firearms in the Metropolitan Police District; in the later period, in England and Wales, the number was still 18.¹³⁸ These were not unusually peaceful years. They knew the Fenian bombing campaign in London, and the Jack the Ripper killings. Yet guns were very seldom used.

Controls, nonetheless, began in 1903, with the Pistols Act, which required the production of a Game or Gun Licence before buying certain kinds of pistol. In the absence of any crime wave, supporters of the Bill were reduced to giving anecdotal evidence of shooting incidents involving children.¹³⁹ But it was not seen as controversial, and had an easy passage.

Next came the Firearms Act of 1920. Still, the use of guns in crime was almost insignificant: between 1911 and 1917, there were 170 instance in London, or an annual average of 24.¹⁴⁰ But, with civil war in Ireland, fears in England of a Bolshevik coup, and the prospect of millions of demobilised weapons coming onto the home market, it was agreed that something ought to be done. Precedent sanctioned temporary measures. The Government chose permanent ones; and its Act was substantially the modern scheme of control. Only one Member spoke of constitutional rights. He was ignored, and the Bill went through both Houses almost by acclamation.¹⁴¹ During the next twenty years, the rate of nearly every type of crime fell. Looking at the eighteen months to the end of 1937, for example, only seven people arrested in the Metropolitan Police District were found in possession of firearms.¹⁴² More controls, however, came in 1937, making sawn-off shotguns and smooth bore pistols certifiable weapons, and prohibiting automatic weapons.

¹³⁸ *Ibid*, Table 2.

¹³⁹ *Ibid*, p.29.

¹⁴⁰ *Ibid*, Table 5.

¹⁴¹ *Ibid*, Chapter 3.

¹⁴² A further 12 had airguns, and one a toy pistol - *Ibid*, p.70.

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Shotgun controls date from 1967, and were the direct response to the killing of two policemen by criminals with *pistols*. Much was said about a trebling since 1961 of indictable offences involving shotguns. Probably there was an increasing use of shotguns. But, for every year since 1961, the figures showing this increase had been collected on a different basis; and the phrase “indictable offences involving shotguns” covered every crime from armed robbery to the theft of unusable antiques.¹⁴³ Controls on the more powerful sort of airgun followed in 1969, though not one instance was produced of them having featured in a crime or accident.¹⁴⁴

And so we have all but lost a right which our ancestors thought equal in importance to the Habeas Corpus Act and trial by jury. And we have lost it with scarcely a shred of good evidence that the loss was required on the grounds of public safety. It would be gloomy yet satisfying to think ourselves victims of despotic rulers or a coalition of special interests. Yet if there is one certain fact in the progress of our gun controls towards completeness, it is that they have been overwhelmingly popular. At almost every stage, they have been quietly accepted or loudly demanded. They are the outcome not of any specific unhappy circumstances, but of a general lack of interest in being free which has been the mark of this country in the period of its decline.

Against controls in the present, of course - whatever suspicion against them it might raise - this purely in itself is no argument. Simply because they were not needed once is no reason for not having them now. Every hypochondriac, after all, does eventually die; and, in the age of Michael Ryan, rather than criticise the superfluity of past legislation, perhaps we should praise the foresight of its makers. But though it is nearly an article of faith that the Firearms Acts are all that keeps London from becoming like Detroit, faith is no guarantee of truth. Different nations have different patterns of behaviour, and with these go different propensities to violence. If there is greater misuse of guns in one country than in another, there is surely more to explaining the variation than knowing whether guns can be had on demand or by permission. The example of America tends to dominate all talk of gun control. But America is by no means the model of

¹⁴³ *Ibid*, Chapter 8.

¹⁴⁴ *Ibid*, p. 89.

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what a country without them must inescapably become. Switzerland has very moderate controls, and every man there of military age is even required to keep firearms on his property. Yet the murder rate is regularly lower than our own,¹⁴⁵ and guns are seldom used as a weapon of assault.¹⁴⁶

Or, to look near the other extreme, there is Northern Ireland. Controls there are more severe even than in England and Wales, only one firearm being allowed per certificate, and shotguns and all airguns being fully certifiable weapons. Nonetheless, the murder rate in that unhappy place was actually higher in several years than that of the United States.¹⁴⁷

Or there is even our own example to be looked at. A shared language and popular culture make England almost a satellite of America. It may be yet noted that the American murder rate with knives alone is far higher than the murder rate in England and Wales from all causes combined;¹⁴⁸ and the only restriction on having any knife whatever in England is at most the additional cost of a ferry ride across the Channel. If our crime rate is below the American even in those cases where no preventive barriers exist to parity, it hardly seems likely that our gun controls are all that contains the rate of murder by shooting.

This being so, there remains the claim that controls, if not equally needed in all places, may still have a certain use. For, on the above principle, it is arguable that repealing all our laws against murder might leave us safer on average than the Americans, though they were invariably to catch and execute their murderers: and who would suppose this a good case for repeal? Therefore, though already low, the criminal use of guns in Switzerland might be even lower were they less easily available. Northern Ireland, without any controls, might well slip from endemic terrorism into civil war. But so far from saving the case for controls, this claim only rests it on and isolates

¹⁴⁵ M.B. Clinnard, *Cities Without Crime: the Case of Switzerland*, Cambridge University Press, 1978, pp. 114-5.

¹⁴⁶ See *Ibid.*

¹⁴⁷ See Table above.

¹⁴⁸ See Table above.

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its most basic assumption, which is that they work. While there is little doubt that threatening the appropriate penalties may check the rate of murder or other crimes, it is very much less certain whether controls on guns do much to prevent their misuse.

Take the incidence of professional armed crime, which is normally the main object of public concern. If controls had any substantial effect here, we might expect to see some reflection of it in the statistical tables. We should see, that is, little use of fully automatic weapons, these being prohibited. Use of handguns, having been controlled nearly seventy years, we might see rather more of. But shotguns and powerful airguns, subject to control only these past twenty years, we ought to see as almost the general firearm. We see, of course, nothing of the kind. Choice of firearm seems determined far more by preference than theoretical availability. In 1967, shotguns, though just controlled, were used in only 21.3 per cent of armed robberies. Pistols, however, were used in 45.6 per cent.¹⁴⁹ Twenty years later, the proportions have not greatly changed: the 1985 figure for shotguns was 26.8 per cent.¹⁵⁰ For obvious reasons of convenience and firepower, most criminals who wish to carry a gun will prefer to carry a handgun - this in spite of the written law. But the law can regulate possession only of what the Police know to exist. How many uncertified weapons there are no one knows. Guns wear out slowly, and are not hard to repair. There might easily be millions of them in the country, held either since before the 1920 Act or since the War, when many controls were practically annulled by circumstances. Certainly, in the four amnesties between 1946 and 1968, weapons handed into the Police exceeded 20,000.¹⁵¹ Another amnesty is planned for this year, and it will be interesting to see how many warehouses will be filled this time with old service revolvers and exotic memorabilia. It seems unlikely in the nature of things that many of the weapons handed in were or will be owned for criminal purposes. The number is, however, vast; and it may be wondered how many others have found their way into the pool of uncertified guns available for criminal use.

¹⁴⁹ Greenwood, *op. cit.*, p.236.

¹⁵⁰ From official figures (supplied by the Shooters' Rights Association).

¹⁵¹ Greenwood, *op. cit.*, p.236.

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Otherwise, if demand for guns exceeded the domestic supply, imports could never be kept out.¹⁵² The record of our drug laws illustrates how difficult it is to control the movement of small but greatly desired items. More specifically, opposed even by one of the best anti-terrorist forces in the world, the IRA has no shortage of personal weapons, only of the men to fire them. For these reasons, if the use of guns in professional crime is increasing - and it almost certainly is - the speed of the increase seems almost wholly determined by fashions within the criminal classes.

Take next the incidence of domestic violence. There can be few households that are completely peaceful, and disputes within them are often peculiarly savage. Whether there would be more disputes, and of greater violence, in the absence of control cannot be known. Perhaps more arguments than now become crockery fights would otherwise become shooting matches. But, writing of homicides in general, the conclusion of at least one researcher is firmly that

more than the availability of a shooting weapon is involved in homicide ... The type of weapons used appears to be, in part, the culmination of assault intentions or events and is only superficially related to causality.¹⁵³

It may easily be, then, that gun controls keep down the number of domestic murders by shooting, but do so largely in those cases where murders are committed anyway, though by other means. They may do little more than force a substitution for handguns of shotguns, crossbows or other, less convenient weapons.

Finally, take Michael Ryan. How maniacs are to be abolished by Act of Parliament probably not the most fervent supporter of the Firearms Bill can explain. Ryan is said to have been obsessed by guns, and there are few obsessions that are not more powerful than the law. Even if public opinion had had its way years ago, and civilian ownership of all firearms had been absolutely prohibited, he might still have collected an armoury quite as impressive as the one he acquired

¹⁵² It might also be said that guns are not difficult to make or convert. See L. Wesley's very interesting *Air-Guns & Air-Pistols*, Cassell, London, 1979.

¹⁵³ Marvin E. Wolfgang, *Patterns of Homicide in America*, University of Pennsylvania Press, Philadelphia, 1958, p.82 (quoted in Greenwood, *op. cit.*, p.130).

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by legal means alone. The existing controls did not put him off. The new controls will not put off anyone strongly inclined to follow his example. What they might do, indeed, is make his example all the easier to follow. How far would Ryan have got that day had his victims been carrying guns of their own? - had not controls disarmed the law-abiding? As it was, nothing endangered him until armed police could be brought in from outside.

None of this should be taken as denying that a problem does exist. The incidence of all violent crime has increased alarmingly during the past four decades. The criminal use of firearms, once a rarity, is verging on the commonplace. It would be unnatural were people to look on these increases and not demand that something be done. Even so, it must be stressed - and repeatedly so - that gun controls are not the required solution. They take from us an important natural right without proper reason and without substantial benefit. Certainly, they do have some damping effect on the rate of criminal misuse. They put the lower class of street thug to the trouble of making phone calls or waiting in public houses before being able to go about armed. They ensure that enraged marriage partners reach out for carving knives more often than automatics. There are some people who would cry up even the smallest potential saving of life as justifying the controls. Similarly, there are people who believe the avoiding of a few disorders to justify censoring the press, or who want motor cars banned on account of the road casualty figures. Every kind of freedom is attended by particular ills, and looking only at these, ignoring its general advantages, is a sure means of herding free men into a slave gang. As said, freedom may be limited for reasons of public safety. But, to justify any limitation, the balance of advantage must weigh far more heavily in its favour than it does in the case of gun control. This is so taking the measure only in itself. And the balance falls still heavier considering also the scheme of law enforcement of which control is an important part.

According to the old jurisprudence, crime is most effectively deterred - of course assuming detection - by the severity of punishment. This is a harsh doctrine, sanctioning as it often does very severe punishments indeed. It is also a strictly limited one. It involves a precise and known use of state power - a collection and focussing of it over a small area, much as burning glass does to the sun's rays. Only criminals are to be in fear of that power: the rest of us are to be left freely

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to go about our business. Today, harshness is no longer in fashion. There is no death penalty, nor flogging, nor hard labour. They are thought barbarously cruel by those whose opinions count. Therefore, when mildness and attempts at the reformation of character fail, the only means left of ensuring obedience to the law is to try restricting the means of breaking it. Yet, though apparently more humane than deterrence, prevention requires the most constant and unwelcome modes of State supervision. Acts which in themselves may be completely harmless, or at least innocent, come under police inspection. Those who use guns in crime are an almost insignificant minority of all who own guns. Yet the entire class of gun owners is treated as a potentially criminal class. Those who take out licenses open themselves to all manner of legal harrying. Those who prefer not to, though perhaps without the least aggressive intent against life or property, become criminals - to be punished if caught. As best illustration of this, however, take not gun controls, but the great Miners' Strike. Violent mass picketing is a breach of public order, and should always be put down with whatever force may be required. Tear gas, baton charges, severe punishment of all taken on the scene after a stated time - these are the proper means of dealing with riots. But modern English law has no Riot Act. Instead of mobs being dispersed, road blocks were set up, for the Police to stop motorists and turn them back or arrest them if suspected of travelling to a picket line.¹⁵⁴ Putting a rope round someone's neck is surely an unhappy thing to do. But is it so bad and unthinkable as trying to govern an entire nation as though it were a prison or a school? As was said against another species of prior restraint:

He who is not trusted with his own actions, his drift not being known to be evil, and standing to the hazard of law and penalty, has no great argument to think himself reputed in the Commonwealth wherein he was born for other than a fool or a foreiner.¹⁵⁵

The normal conclusion to this kind of essay is to call for the dismantling of controls, and to discuss the ways in which it might be done. My own feeling, however, is that this would be to end on a note of inappropriate optimism. Much is said of a liberal revival in this country since 1979. Certainly, the economic role of the State is smaller now than ten years ago, and this is

¹⁵⁴ See *Policing London: Collected Reports of the GLC Police Committee*, 1986, p.100.

¹⁵⁵ John Milton, *Areopagitica* (1644), Clarendon Press, 1886, p.30.

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reason to be glad. But it should not be mistaken for more than it is. Just as even the Chinese and Russian governments have abandoned the greater follies of socialism, so has our own tried a limited freeing of markets - and for much the same mercantilist reason, of preserving or maintaining a certain national status. The immediate needs of economic efficiency are one thing. Liberalism is something rather larger, and altogether stranger and more frightening to Government and public alike.

The Firearms Bill will become law, and after a decent interval will be followed by another, and then by another, until guns are in theory outlawed among the civilian population. There is no opposing the general will on this point. There is no place for fantastical schemes of deregulation. All that can usefully be done is to observe and record the progress of folly - and hope that its worst consequence will be felt by a later generation than our own.

Chapter Six

**Putting the Case Against Gun Control:
Reflections on an Outrageously Effective
Television Performance - 2nd May 1996**
by Sean Gabb
2,318 words

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Last 2nd May [1996], a Thursday, I was invited to Scotland to sit on the panel in *Words with Wark*, a television discussion show which replaces *Question Time* there once every month. The researchers, it seems, had been unable to find anyone in the country to denounce gun control, and so had to make do with an English accent. Having found me, though, they did their best to keep me happy. I was offered a taxi from South East London to Heathrow, which I only turned down because public transport is faster during the day. I was given a business class seat on a flight to Glasgow - cost £120 - and a first class railway sleeper back down to Euston - cost £85. Then there was a stretched Rover to Ayr Town Hall, where the programme was to be recorded. Adding my fee - which I could probably have doubled had I been inclined - I may have cost them more than the average MP. Nice work when you can get it.

On the panel with me was the Editor of *The Sunday Mail*, and a journalist whose name I never caught but who looked just like someone I knew and loathed at university, and Guy Savage, representing the Shooters' Rights Association. These first two were there to argue for a ban on the private ownership of guns, the third to claim that the Firearms Acts 1920 to 1988 strike a fair balance between competing interests, and that this should not be upset just because a pair of lunatics in Dunblane and Tasmania had decided to shoot lots of people. In the studio audience were four politicians - Sir Michael Hirst, Chairman of the Scottish Conservative Party, Margaret

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Ewing, from the Scottish Nationalists, and two others whose names I again missed but which are not worth looking up. I have no idea how many people watch *Words with Wark*. But I imagine the BBC had given me a seven figure audience to regale with my opinions.

And my opinion is that gun control is wrong in any form. I believe that an adult should be able to walk into a gun shop and, without showing any permit or identification, be able to buy as many guns and as much ammunition as he can afford; and that he should be able to carry this round with him in public and use it to defend his life and property. This is not a popular view, I grant. On the other hand, I doubt if many armed criminals would take more notice of a gun ban than they do of the present controls. And it is worth asking how many people Michael Ryan could have killed had anyone else in Hungerford High Street been carrying a gun. As the Americans say, "God made men equal, and Smith & Wesson make damn sure it stays that way".

I earned my fee by saying all this in the studio. I am sure I pleased the researchers. They spend much of their lives talking to people who say the most outrageous things on the telephone, but who then lose heart in the studio and agree with everyone else. The audience was another matter. Speaking on the Kilroy programme here in London, I could probably have made people bounce up and down on their seats with rage. Just as likely, there would have been a few Dunblane parents to sob pathetically into the cameras. Speaking in Ayr, the response I got was a shocked silence. I looked out into a sea of faces that reminded me of nothing so much as the Jewish audience in Mel Brooks' *The Producers*, during the opening number from *Springtime for Hitler*. At last, someone who claimed to be a minister of religion and a father of two denounced me for pulling God into politics - as if that were not what He is there for. Someone else who said he fought in Korea claimed I was so plainly unbalanced that I should never be let near a gun.

As soon as what passed for debate had started again, I took care to score a big "own" goal. An Olympic shooter spoke, followed by a clay pigeon shooter. They were not against a gun ban - so long as *their* guns were left out of it. No said I, this would never do. The purpose of guns was to kill people. The only matter of importance was to make sure they were used to kill the right people, namely burglars and street criminals. From the look on the Olympic man's face, he was

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thinking of quite another category of people to kill.

Twenty minutes pass very quickly in a television studio. I had barely warmed up before my panel was ejected, to make way for the politicians to come on and bore everyone stiff with rail privatisation and nursery vouchers.

Afterwards in the reception, I found myself shunned like the lepers of old. The locals turned their backs on me. Sir Michael Hirst looked straight through me as I sidled up to him with my glass of orange juice - so much for the party of individual freedom! Guy Savage muttered that my comments had been "unconstructive". On the ride back to Glasgow, he pointedly ignored me, talking to the driver instead about negative equity. This was a shame. On the ride over, he had been very friendly, sharing with me his vast knowledge of the present law on guns, and even agreeing to address a Libertarian Alliance conference on the right to keep and bear arms. Realising that my presence was not desired, I pretended to sleep all the way back.

On the whole, I did pretty well. One of the great falsehoods of modern life is that arguments are won by being "moderate" - by conceding the other side's point and then haggling over the details. They are not. The gun lobby, for example, spent nearly half a million after Hungerford trying to stop the Firearms Bill that resulted from it. I imagine most of the cash went straight to a gang of sleazy PR hacks, who organised a few lunches with politicians too corrupt even to stay bought. What little found its way into the media was one long grovel, by clay pigeon and Olympic shooters begging for laws that would hurt only other gun owners. They rolled over and showed their bellies to Douglas Hurd. Not surprisingly, he gave them all a good, hard kicking.

Arguments are won by being honest - by saying what you believe as clearly as possible, as often as possible, and never mind how "unconstructive" it seems in the short term. Doing so has three effects. First, it shifts the middle ground in a debate. This is valuable in a country where being moderate is so in fashion. For this middle ground is not an independent point of view, but can be pulled sharply to and fro by what is happening at the extremes. Before about 1975, for example, the public spectrum on economic policy stretched between Soviet communism and

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social democracy. Accordingly, the moderates were all pink socialists. Now that there are libertarians demanding a total free market, the moderates have become blue social democrats. And, though important, the collapse of the Soviet Union was *not* entirely to blame for this - in those countries without a libertarian fringe, after all, the consensus is still decidedly pink. In my own case, had I not been in that studio, the spectrum would have stretched between a total ban and the *status quo*; and anyone trying to sound moderate would have had to favour many more controls. As it was, Mr Savage came across as the centrist - a fact recognised by the people who did not shun him as they did me, and a fact worth noting by the Shooters' Rights Association if it ever wants to live up to its name.

Second, it gets converts. Granted, my audience in the studio was full of glum blockheads. But there must have been dozens of people at home who were hearing what I said for the first time and who agreed with every word of it. Most of these will stay at home. Others - one or two, perhaps - will become committed libertarian activists. They will join the Libertarian Alliance. They will hand out its publications. They will write for it. They will appear in television studios, putting the libertarian case on whatever they have been called in to discuss. Moreover, even the blockheads have a function. If they can remember what I said in the studio - not hard, bearing in mind how clear I was - they will spread it by explaining to friends and relations how scandalised they were by it. Sooner or later, the message will reach someone who is not at all scandalised; and another convert will have been made. And that is how intellectual revolutions get under way. With his claim that Hungerford and Dunblane were "failures of policing", and the like, I doubt if Mr Savage enthused anyone to go out and do something against the gun grabbers.

Third, it establishes a position. Unusual ideas are generally ignored at first. Then, if they continue being put, they are laughed at. Then they must be argued with. Occasionally, they become the common sense of the next generation. That is how it was with socialism in this country. More recently, it was like that with monetarism and council house sales. I do not know if my dream of abolishing gun control will be so lucky. But, to be sure, no one will take notice of it unless someone goes to the trouble of clearly arguing for it.

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Yes, I did pretty well in Scotland. I may do even better the next time I am allowed into a television or wireless studio.

Supplement - Saturday 18th May 1996

I was allowed back yesterday morning. I cast the first version of the above onto the Internet on May 10th. The following morning, Jim Hawkins of BBC Radio Northampton replied by e-mail. He had read my pamphlet and liked it, and he wanted me to repeat it on his programme on Friday the 17th.

So there I sat for an hour yesterday morning, telling another million people why the gun control laws should be abolished. I was against Anne Pearston of the Snowdrop Campaign - this being a group set up after Dunblane to press for a total ban on handguns. Though honest, she was not very bright, and I went through her like a hot knife through butter. When I accused her of wanting to live in a slave state, she answered "Yes, I do". When I further accused her of trusting no one else with guns because she felt unable to trust herself with one, she started to panic. When I repeated my wish that someone else in Hungerford had been armed, she referred to my appearance on *Words with Wark*, saying only that I had worried her then, and I worried her now.

I said much else, ranging from the Jews in Nazi Germany ("what if they had been able to shoot back?"), to Waco ("men, women and children murdered by the American Government"). In short, I indeed did even better this time than last - and if anyone doubts this, I have a tape to prove it.

Enough of boasting, however. The reason for this Supplement is to emphasise that extremism does work. Consider:

First, it was extremism that got me on *Words with Wark*, and an extremist report of what I did there that got me on the Jim Hawkins show. It annoys me that I can never make the national press - versions of my pamphlet, for example, came straight back to me from *The Spectator* and

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The Sunday Telegraph, as if wafted on cries of horror. Nevertheless, the electronic media can hardly get enough of me and Brian Micklethwait and the rest of us. Whether or not we can ever win it, we lack no opportunity for putting the libertarian case.

Second, it is extremism that makes us so effective in debate. The gun grabbers and other enemies of freedom have so far had an easy ride in the media. They have only had to argue with cowards and fools who, worried not to upset anyone, have failed to make most of the good points. They have never known principled, uncompromising opposition. Faced with it, they behave like rabbits faced with a new strain of myxomatosis: they have no defences. If Mrs Pearson was out of her depth with me, so at present are all of her colleagues. They have ready answers to the whinings of the clay pigeon lobby, but none to anyone who asserts a right of self defence against “burglars, armed robbers and other trash”.

Third, extremism really does shift the middle ground. In the main pamphlet above, I was unable to give examples from my own experience. Since yesterday morning, I can. Someone from a shooting club called in, and said “I want to take a middle view between the speakers”. He then argued against any change in the gun laws. Without me there, he could never have got away with that. He would have been denounced as a potential Thomas Hamilton, trying to save his penis extension. Half an hour of me, and Mrs Pearson nearly embraced him. Guy Savage and the Shooters’ Rights Association - again, please take note.

In a few minutes, I will send this revised pamphlet to Brian, for publishing by the Libertarian Alliance. Before he even sees it, though, it will be all over the Internet - there to be read by anyone else who happens to have a studio to fill.

Chapter Seven

Against Identity Cards **by Sean Gabb** **4,313 words**

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Introduction

Aside from Eire, ours is the only country in the European Union not to have some kind of identity card scheme. Elsewhere, it has long been common for people to carry, and be required to produce, identification. Here, by law and custom, there is no need for people to identify themselves, unless they are seeking some positive benefit or have been arrested.

This difference is under attack. The Prime Minister, the Home Secretary, a former Deputy Leader of the Labour Party, and the Editor of *The Sunday Express* - to name just a few - have called for the introduction of identity cards.¹⁵⁶ With the present balance of votes in the House

¹⁵⁶ George Jones, "Major backs ID cards to fight crime", *The Daily Telegraph*, London, 8th June 1994; The Right Honourable Michael Howard QC MP, Home Secretary, "Speech to the 111th Conservative Party Conference, Thursday 13th October 1994", *Conservative Party News Release* 759/94, p.15; Roy Hattersley, "How Britain can solve its identity crisis", *The Daily Mail*, London, 10th August 1994; Brian Hitchen, "ID cards for all", *The Sunday Express*, London, 16th October 1994.

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of Commons, it seems likely that these particular calls will come to nothing. Even so, the issue is not one that will go away. With this in mind, I offer the following objections. They are condensed from an earlier piece written for the Libertarian Alliance, which, whatever its merits, has the defect of being too long for general circulation. Readers are advised to buy a copy if they want more information than I have room to give here.¹⁵⁷

One: the Fight Against Crime

The commonest argument in favour of identity cards is that they will help in the fight against crime. After all, it sounds reasonable to claim that if we all have to identify ourselves on demand, the opportunities for breaking the law will be diminished.

Reasonable as this sounds, however, it is not entirely supported by the evidence. Let us consider some of the leading claims:

Claim One

According to Fred Broughton, Chairman of the Police Federation:

In relation to crime, terrorism and any investigation, [an identity card scheme] would be a great advantage. It would make the police more efficient because sometimes people lie about their identification, which can be very time consuming.¹⁵⁸

Reply - According to Dr Michael Levi, Reader in Criminology at the University of Wales:

In ordinary policing terms, the value of ID cards is hard to discern.

Many police officers to whom I speak tell me that they know, or believe they

¹⁵⁷ Sean Gabb, *A Libertarian Conservative Case Against Identity Cards*, Political Notes No. 98, the Libertarian Alliance, London, 1994, £2.40.

¹⁵⁸ Source: "National identity card high on Tories' agenda", *The Independent*, London, 10th September 1994.

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know, who the offenders are in their neighbourhood. The problem is proving it, given that they don't have the resources to conduct surveillance. In this situation, identity cards are an irrelevance, a tough soundbite that has no practical effect.

I cannot imagine how the chances of detection or conviction will be improved significantly by this measure in any form....¹⁵⁹

Claim Two

According to Roy Hattersley:

[Identity cards would make it] more difficult for conmen to talk their way into pensioners' bungalows....¹⁶⁰

Reply - This is a bizarre claim. Telephone engineers, police officers, and all the other people whom conmen impersonate already have identification documents. Their victims suffer by not asking to see these documents. I fail to see how providing everyone with an identity card will change matters.

Claim Three

Mr Hattersley again:

[They would also prevent teenagers renting pornographic videos....¹⁶¹]

Reply - Another bizarre claim. There are no pornographic videos legally available in this country. And here, as with drugs and prostitution, illegal suppliers are more interested in how rich their clients are than how old.

¹⁵⁹ Speech in Birmingham to the Council of Mortgage Lenders; Source: Christopher Elliott, "ID cards 'will not reduce crime'", *The Guardian*, London and Manchester, 15th October 1994.

¹⁶⁰ Hattersley, *op. cit.*.

¹⁶¹ *Ibid.*.

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Claim Three

According to the Editor of *The Sunday Express*:

Illegal immigrants and dole scroungers would find it impossible to dip their sticky fingers into the welfare pot.¹⁶²

Reply - Not so. According to Peter Lilley, the Secretary of State for Social Security, identity cards would do little to curb benefit fraud, which at the moment is far more a matter of hidden earnings from the black economy than of impersonation.¹⁶³

As for illegal immigrants - according to a Peter Lloyd, a former Minister at the Home Office, "the main problem faced by the immigration officers at Dover is fake French ID cards".¹⁶⁴

Other Claims

There are similar claims about bank fraud, impersonation at elections and in driving tests, about people who lie in job applications about their age and qualifications, and so forth. But I will not continue making specific reply to specific claims. I will instead observe that they all rest eventually on three assumptions that are, and will for the foreseeable future remain, unlikely: that everyone will carry the right identification; that the information to which identity cards give access will be entirely correct; that the costs of an identity card scheme can be precisely known. Consider again:

¹⁶² Hitchen, *op. cit.*

¹⁶³ Charles Reiss, "Cabinet clash over ID cards hits Howard", *The Evening Standard*, London, 11th October 1994.

¹⁶⁴ Source: Alan Travis, "Conservatives at Bournemouth: 'Rubbish' cries greet Howard's ID card plan", *The Guardian*, London and Manchester, 14th October 1994.

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First, all experience suggests that any document the authorities can produce can be reproduced by criminals. This has long been the case with coins, banknotes, passports, ration coupons, postage stamps, and any other thing of nominal value. In the United States, where official identification has become far more important than it is yet here, one can buy a green card, a social security card and a driving licence for as little as \$120. All passable forgeries, they can be ready within the hour.¹⁶⁵ These are for illegal immigrants needing to work and get their children educated, or for teenagers wanting to drink without official harassment. Doubtless, for criminals or terrorists, much better is available.

To suppose that digital technology can change things is to know nothing of computers, and nothing of criminal ability. We can have identity cards with a photograph, a thumbprint, and a full retina pattern - and forgeries would be on the streets within a month. In Singapore, a country not famous for high levels of crime, perfect copies of the most elaborately bank cards presently issued are available as blanks for a few pounds.¹⁶⁶

Second, the official information held on us is riddled with errors more or less serious. According to a National Audit Office report, 35 per cent of the 12.2 million driver records, and 25 per cent of the nine million vehicle records, held by the Drivers and Vehicles Licensing Authority contain at least one error.¹⁶⁷ Such levels of inaccuracy would soon wreck an identity card scheme. There would be wrong names on the cards, and wrong photographs. People would suffer perpetual inconvenience from the use of incorrect data.

There is also the certainty of malicious hacking. There is nothing mysterious about hacking. Nor is it difficult. The newspapers are full of stories about information altered, destroyed, or illegally retrieved. Recently in south London, for example, someone broke into the local Health Authority

¹⁶⁵ Sean Mac Carthaigh, "Californians ponder cost of a proposition they didn't refuse", *The Times*, London, 2nd December 1994.

¹⁶⁶ Simon Davies, "Please may I see your identity card, Sir?", *The Daily Telegraph*, London, 13th October 1994.

¹⁶⁷ See Dr Edgar Whitley, "Too many errors on the cards", Letters to the Editor, *The Daily Telegraph*, London, 12th August 1994. The National Audit Office report mentioned was reported in *ibid.*, 22nd December 1993.

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computer, and altered a standard letter that was sent out to 5,000 women before anyone noticed that a request to attend for a cervical smear had been altered to an invitation to drop in and “have your fanny examined”.¹⁶⁸

Third, The Home Office has estimated that a compulsory scheme using a plastic card, with photograph, fingerprints, date of birth and signature, would cost £500 million to establish, plus £100 million per year to maintain thereafter.¹⁶⁹ These costings we can dismiss unconsidered. Bearing in mind that the civil servants can be expected to buy the wrong computers, and that about five per cent of people each year will lose or damage their cards, the final cost - as with Concorde, and the Humber Bridge, and many other public works - is anyone's guess.¹⁷⁰

So far as law-enforcement is concerned, the immediate effects of identity cards would be a slight increase in the preparation costs of committing certain kinds of crime, and an expansion of forgery. For the rest of us, they would mean a multiplication of bureaucracy and yet another waste of public money.

Two: the Destruction of Liberty

The objections raised above are important. They are the sort of thing that can worry “right wing” Ministers and the more respectable thinktanks. As such, it is useful to raise them as often as possible. But they are not the most important objections, and they may not always be valid. Experience and better software will eventually reduce forgery and inaccuracies; and the accessibility of more information will diminish the opportunities for fraud. The primary

¹⁶⁸ Source: “Hacker hunt after smear campaign”, *Computer Weekly*, London, 20th October 1994.

According to the Audit Commission, hacking and other computer fraud is endemic. There are almost no controls on access to sensitive data, and few intrusions are noticed until after harm has been suffered: see the Audit Commission, *Opportunity Makes a Thief - An Analysis of Computer Abuse*, Her Majesty's Stationery Office, London, 1994.

¹⁶⁹ Source: Richard Ford, “Ministers facing a minefield”, *The Times*, London, 14th October 1994.

¹⁷⁰ The figure of five per cent was estimated by the Australian Government in 1988, when it was considering an identity card scheme. See Simon Davies, “Please may I see your identity card, Sir”, *The Daily Telegraph*, London, 13th October 1994.

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objection is the very existence of most accessible information. And so far as the secondary objections can be overcome, so this one is magnified.

Until recently, the amount of information that identity cards could make available was limited. There could be a photograph, name, address, and a few other details. For anything else, it was necessary to look through various paper archives - a process so slow and expensive, it was not worth even considering for everyone all the time. Electronic databases remove this limitation. They ensure that information, once gathered, can be stored at almost zero cost, and retrieved at once in any permutation. They are also ensuring that the range and depth of information gathered and stored can be greatly expanded.

Already, MI5 is connecting all the government databases, to give access, "for reasons other than national security" to "personal information held on tens of millions of people, from tax files to criminal convictions".¹⁷¹ To this single database the Home Secretary wants to add the DNA records of all suspected criminals - that is, of anyone arrested for any offence.¹⁷²

Then there is the information gathered and held by private organisations. Since 1979, financial confidentiality has been abolished in this country. A series of laws, culminating in the incorporation of the Money Laundering Directive, gives the authorities open access to our banking and other financial records. For the moment, these records are stored in databases outside the public network; and the authorities must still ask for them to be produced. But this is too great an inconvenience to be allowed in the long term.

The same will soon be true for our shopping records. My weekly receipt from Asda gives an itemised breakdown of all that I buy there. It also carries my credit card account number. I have receipts from other shops that do the same. A few years more of falling hardware prices, and

¹⁷¹ David Hencke and Richard Norton Taylor, "MI5 hacks its way into privacy row", *The Guardian*, London and Manchester, 19th October 1994.

¹⁷² The Right Honourable Michael Howard QC MP, Home Secretary, "Speech to the 111th Conservative Party Conference, Thursday 13th October 1994", *Conservative Party News Release 759/94*, p.13.

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someone need only think it useful, and there will be no more shopping secrecy. Some of us, no doubt, will start paying in cash - especially for more personal items. But this will not long remain an alternative. The panic about money laundering is too strong: and there is too much talk about the smart card "e-purses" now being tested in America.

Looking ahead, there are developments that can only now be imagined. At the moment, many of us must wear identity cards in our places of work. This helps the security staff. I have no doubt that someone will think it equally helpful for us to do the same in public. It will then be possible for digital video cameras to monitor and record identities from the wearers of interactive identity cards. Moving somewhat further ahead, it will be possible to match the faces of people caught on video to digital images stored centrally - thereby dispensing with much of the need for identity cards. This again is a matter of no more than storage space and processing speed.

I see the progressive integration of every record ever opened on us - from our first weighing in the maternity ward to our assessed susceptibility to dying of heart disease. In this new order of things, an identity card must be seen not as a thing in itself, but as the key that each of us must carry to a vast electronic filing cabinet of information.

Nothing to Hide, Nothing to Fear

Now, I hear the *mantra* endlessly chanted against this sort of argument: "Those with nothing to hide have nothing to fear". We do not live in a police state, but in a democracy. We have independent courts and a free media. And I must admit that the present and likely extensions of surveillance are not the result of some evil conspiracy. Each extension can be justified by reference to some benefit. Once again, consider:

- If I fall under a bus and am rushed to hospital, to imagine the value of a card that will give instant access to my blood group, my allergies, any other medical conditions that I may have, and my next of kin;

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- If some non-invasive way is discovered of verifying DNA against details centrally recorded, how it will save billions in credit card and social security fraud;
- If a terrorist bomb explodes, to think how the police computers might scan the street videos for the past six months, identify everyone there and check for previous convictions, or anything suspicious in any other records - the purchase, perhaps, of garden fertiliser;
- If a woman is raped and left for dead in a park, how it will be possible, even if the rapist wore a condom and left no other body fluids, to profile the population - to see who has a taste for violent images, as recorded by the book and video shops, who is shown by evidence from other sources to have a tendency to violence, and who lives within easy distance of the park, or whose movements took him close to there; and who, therefore, is likely to have committed the crime, and should be pulled in for questioning.

Agreed, these are benefits. But everything has a cost. And I can think of two very plain costs involved in this scheme of total surveillance.

First - Any government that is able to know so much about its subjects is able to single them out for persecution. Even paper identity cards have been repeatedly used for purposes that range between the vexatious and the murderous. Without details of religion stamped on their papers, the Jews of Central Europe would not have been so easily herded into the concentration camps. The same is true of the massacres in Rwanda: it was the word Tutu or Hutu on identity cards that let the murderers find their victims. I am not suggesting that the British Government will turn this nasty. But there are other, gentler forms of persecution. At the moment, for example, smokers are sometimes being denied medical treatment on the NHS.¹⁷³ There are suggestions

¹⁷³ For details, see Petr Skrabanek, *The Death of Humane Medicine and the Rise of Coercive Healthism*, The Social Affairs Unit, London, 1994, p.123 *et passim*.

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for the licensing of childbirth, to bring an end to “irresponsible” procreation.¹⁷⁴ For the moment, we can lie when the doctors ask if we smoke. We can put on suits and smile at the social workers, and hope they will not guess what substances we once consumed, or what we still do in bed. But identity cards will make that harder where not impossible.

Anyone who is happy to have every last detail of his life known to the Government is gambling on the future. We are all members of some minority: and there is nothing that we are and nothing that we do that is not unpopular with someone who is, or may one day be, in authority.

“Those with nothing to hide have nothing to fear”? Well, this is fine enough for those who can believe that something about them presently innocuous will not one day be used against them, or their children or grandchildren. But who can infallibly believe this?

Second - even if governments refrain from these mild persecutions, identity cards will tend to establish a despotism. This will not be openly horrible. It will in its outward appearance be gentle and reasonable. It will remain democratic, in the sense of allowing elections to office and the discussion of authorised topics. Its uses of power will be more or less in accord with public opinion. But it will allow no individuality.

Even without other punishment, to be watched is often to be deterred. Most of us, after all, are quite timid. We do not pick our noses in public, or scratch our bottoms, or cast openly lustful glances, for fear of how we shall be regarded by the world. Shame is a natural, indeed a necessary feeling. But to let shame act as a restraint in all our acts means a return to the minute surveillance of village life from which our ancestors so gladly escaped. We are looking at a future world in which there will be no privacy, no anonymity, no harmless deception, in which we shall all live as if on a stage under the watchful eye of authority.

This homogenising pressure will be reinforced by economic policy. The state I am imagining

¹⁷⁴ See Judy Jones, “Top doctor urges legal controls on parenthood”, *The Observer*, London, 7th August 1994. See also Skrabanek, *op. cit.*, pp. 158-59.

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will not be socialist in the old sense, of central planning. There will be enough of a market to ensure minimal coordination. But this will not be enough to lift the economy from permanent recession, with high unemployment and periodic bursts of inflation - and, most importantly, few prospects of personal independence.

Until quite recently, it was possible for many people to say and do almost as they pleased, free from any need to court or keep the good opinion of others. I think of Edward Gibbon. I think of Charles Darwin. I think even of Friedrich Engels. These were men who outraged the dominant opinion of their age, but whose independent means placed them beyond the effects of this outrage. Today, most incomes are earned, and all are heavily taxed. Few of us have time for dissenting speculation; and then we must take care not to upset our employers or customers beyond an often narrow limit.

The combined effect of surveillance and economic dependence will be an invisible but effective control. There will be no definite formulation of what we must not do, no Act or article in a code against which protest might be made. Instead, people will come to realise that safety lies in trying to behave and to think exactly alike. The exposure consequent on doing otherwise will be too awful if vague to contemplate. There will, of course, be some exhibitionists, willing - and perhaps happy - to expose their lives to the interested scrutiny of others. But I will not think much of a world in which such people have become the only individuals.

And the death of individuality will mean the end of progress. The causes of the mass-enrichments of the past three centuries are difficult to separate and weigh. But it is obvious that much is owed to individual genius. Think of the steam engine, the telephone, the aeroplane - even the computer: these have been much improved and cheapened by common ingenuity; but they all came in the first instance from the mind of some inspired individual or sequence of individuals who were often denounced in their own time as cranks or monsters, where not physically attacked. Cut down that tree of individuality - or, as I am now discussing, merely starve its roots - and it will blossom no more. The lack of overt regulation in this future state may delight the standard Thatcherites. But with an economy less formally hampered than the one

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in which the Internet has emerged, our descendants may sit as stagnant and self-satisfied as the Chinese were when the Jesuit missionaries first arrived.

Three: Possible Restraints

For many, this will seem wildly pessimistic. I have entirely neglected the possibility of a legal and institutional framework in which the dangers of identity cards will be restrained. Roy Hattersley, for example, believes that the corrupt or domineering use of

information - who was where, when - [c]ould be made a criminal offence.¹⁷⁵

Otherwise, we can have a privacy law, to let us say “no” to many demands for information, and give us legal redress against damaging uses of what information we must make available.

It is, however, wishful thinking to suppose that the sinister potential of identity cards can be abolished by a few changes in the law. It is possible to establish a scheme in which information collected for one purpose cannot be used for another - so that a doctor could have access to medical but not shopping or tax records, and a Policeman access to details of criminal convictions but not of a sex-change operation. It is possible to make laws against the passing of information, or the means of obtaining information, to unauthorised persons.

But the value of a unified database is that the information on it can be shared very widely. We can start with all manner of good intentions about limiting access. In practice, these will soon become a dead letter - at the insistence of those now calling for identity cards, and perhaps of those who now talk about restraints. Why should a hospital not have access to a patient’s immigration status? Why not to his sexual inclinations? Why should the Police not be able to check what books a suspect has borrowed from the library, or what bus journeys he makes? Why should a Social Security official not have access to a claimant’s tax and banking records, and

¹⁷⁵ Hattersley, *op. cit.*

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details of spouse and children? Why should an insurance company not have access to a customer's medical records, to see what predisposition he may have to an expensive illness or early death? Why not to his shopping records, to see if he has filled out his lifestyle questionnaire truthfully? Why should a senior manager, in a "national champion" company not have access to the full range of a subordinate's private life - to see if he is drinking too much, or smoking, or taking bribes from a foreign rival, or putting on a wig to pick up sailors on a Friday night?

I do not need to ask what pretence will be made for each specific knocking down of the original barriers. But, once the principle of identity cards has been conceded, it is a matter of time alone before everyone with a right to inspect part of the information to which they give access will have claimed and obtained a right to inspect the rest. And all else will follow from that.

Conclusion

As said, the present calls for an identity card scheme are unlikely to succeed. Too many Conservative MPs have promised to oppose them on principle - and have promised too vehemently for even politicians to back smoothly away. To others who have no principled objection, but who still cannot think of the poll tax without shuddering, cost may be a safe excuse for opposition.

But only for the moment - not in the long term. On present trends, identity cards must come. That we do not yet have them is an aberration. It is like an area of the beach still dry long after the incoming tide has soaked all around it. The central database exists, and it is rapidly filling with new information. The full evil of surveillance will require identity cards, so that we and the information held on us can be conveniently matched. But there is evil enough now without them; and more will inevitably follow.

The only real salvation lies in recognising this fact. The great majority of those who are currently against identity cards take it for granted that a government large enough to impose and use them

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is a good thing. They like the welfare state, and have nothing against a large bureaucracy. But this consensus must change. The one sure means of emptying the database is to bring about a permanent reduction in the size and power of the State. The welfare state must go. The war against drugs must be conceded. The snoops and regulators must be sent looking elsewhere for jobs.

Of course, what I am asking is that everyone who dislikes identity cards should endorse and start calling for the full Libertarian Alliance agenda. I cannot imagine that this will ever happen. But I can still hope.

Chapter Eight

The Growth of Global, European and British State Control of Financial Transactions

by Sean Gabb
3,181 words

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Introduction

During the past ten years, there has been a rcvolutionary - but largely unnoticed - change in the relationship between the British banks and their customers. Traditionally, a bank in the United Kingdom had an implied contractual obligation not to disclose information concerning the affairs of a customer. This obligation extended to all facts about a customer known to or discovered by the bank, and not merely to the state of his account.

The obligation was qualified in various ways, the most important of which for this discussion was compulsion of law. By s.7 of the Bankers' Books Evidence Act 1879 - amended by the Banking Act 1979 - a party could by court order inspect and copy entries in a banker's books. This allowed the Police to gain access to a suspected person's records, but only after charges had been laid. If other disclosures were made to the Police, they were not strictly lawful; and they were very seldom made.

By s.17 of the Taxes Management Act 1972, a bank was further obliged to inform the Inland Revenue of interest paid to a customer above a certain level.

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Beyond these exceptions, there was total banking confidentiality in this country.

Money Laundering

During the 1980s, however, governments all over the world began to intensify the “War on Drugs”. Starting with the 1913 Harrison Act in the United States, this has gradually expanded to an international prohibition of the production, sale and use of most mood altering substances.

This “War” has not been a success. The prohibited substances are in high demand; and high demand has meant high prices that make it very profitable to transport and sell them in quite small quantities. Nobody knows for sure what proportion of drug imports are stopped by HM Customs and Excise, but I am told it may be as low as three per cent - and this is an island, where the control of imports is far easier than for landlocked countries. And so effort since the 1980s has increasingly expanded from merely trying to stop the production and sale of drugs to trying to stop profits from the trade from being reinvested.

These profits may be very large. In 1989, the Financial Action Task Force of the European Community estimated that

sales of cocaine, heroin and cannabis amount to approximately \$122 billion per year in the United States and Europe; of which 50 to 70% or as much as \$85 billion per year could be available for laundering and investment.¹⁷⁶

Writing in the United States, E. Nadelmann has argued that

insofar as criminals... act as they do for the money, the best deterrent and punishment is to confiscate their incentive. A second rationale is that, while the higher level and more powerful criminals rarely come into contact with the illicit goods, such as drugs, from which they derive their profits, they do come into contact with the proceeds from the sale of these goods. That contact often

¹⁷⁶ Quoted by William C. Gilmore, in *International Efforts to Combat Money Laundering*, Grotius Publications Limited, Cambridge, 1992, p.ix.

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provides a 'paper trail' or other evidence, which constitutes the only connection with a violation of the law. A third rationale is that confiscating the proceeds of criminal activities is a good way to make law enforcement pay for itself.¹⁷⁷

In 1988 came the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was an international treaty to prevent the laundering of drug money.

The Money Laundering Directive

Then in 1990 came a Council of Europe Directive on money laundering. This was followed in 1991 by the Council Directive on Prevention of Use of the Financial System for the Purposes of Money laundering, a law made by the European Community. This Directive orders the Member States of the Community to create a number of criminal offences connected with drugs and money laundering in general.

Most importantly, "money laundering" is defined by Article 1 of the Money Laundering Directive as:

[T]he conversion or transfer of property, knowing that such property is derived from a serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and

the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a serious crime.

I will briefly pause here to explain the legal status of this Directive under British law.

The European Union is a trading bloc of 15 Member States. It is regulated by a number of

¹⁷⁷ E. Nadelmann, "Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions", *Inter-American Law Review*, No. 18 (1986), pp.33-34; quoted Gilmore, *op. cit.*, pp. ix-x.

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treaties, the most important of these being the Treaty of Rome 1957 and the Treaty of Maastricht 1991. To enforce the terms of these Treaties, it is able to make three kinds of laws:

A Regulation becomes part of the domestic law of each Member State automatically, without regard to the wishes of any government or legislature;

A Directive becomes part of the domestic law of each Member State only after it has been incorporated by the relevant legislation;

A Decision is a particular command or judgment, and it affects only those for whom it is made.

The Money Laundering Directive is a law of this second kind. As such, it is intentionally unspecific. It only takes effect when made specific in the domestic laws of each Member State.

And so I will look at how the Directive is applied in this country.

The Control of Money Laundering in the uk

The laws against money laundering in this country are contained mostly in the Criminal Justice Act 1993 and the Money Laundering Regulations 1993 - which both give effect to the European Union's Money Laundering Directive. Apart from this, there are sections of the Police and Criminal Evidence Act 1984, the Drug Trafficking Offences Act 1986, the Criminal Justice Act 1987, the Criminal Justice Act 1988, The Companies Act 1989, and the Prevention of Terrorism (Temporary Provisions) Act 1989, together with numerous statutory instruments and "voluntary" codes imposed by the Bank of England.

These laws have entirely altered the old state of affairs. A bank today is obliged to disclose information virtually on demand to the Police, the Inland Revenue, the Department of Trade and Industry, and the Serious Fraud Office, to name only the most frequent applicants.

Further, the banks and other financial institutions must report all "suspicious transactions". These include the making of unusually large cash deposits - that is, deposits larger than £10,000 -

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numerous deposits and withdrawals of cash, using night safes to make large deposits of cash. Failure to report is a criminal offence, and on conviction, a bank or other financial official can be jailed for a maximum of five years. In many cases, usually connected with drugs or terrorism, it is for an accused official to prove he had no reason to suspect that a transaction was irregular. If it can be proved that he actively assisted to hide a transaction, he faces a maximum of 14 years' imprisonment.

Still further, even if no suspicious transactions can be proved, a senior manager can face a fine or two years' imprisonment, or both, for failing to put adequate safeguards in place.¹⁷⁸ This requires every financial institution to appoint a "money laundering reporting officer", to make and maintain regular contact with the authorities. Apart from this, financial staff are encouraged to make anonymous reports to the National Criminal Intelligence Service.¹⁷⁹

In addition, "financial institution" is defined not merely as bank, building society, insurance company, and so forth, but also as solicitor, accountant, estate agent, auctioneer, antique dealer and general shopkeeper, and casino. Anyone who receives large sums of money from the public

¹⁷⁸ Source: Paul Durman, "Bankers face jail over laundering: Institutions will need systems to deal with suspicious transactions", *The Independent*, London, 28th October 1993; also Dan Atkinson, "20/20: Liberty lost in the wash", *The Guardian*, London and Manchester, 22nd August 1992.

See also Michael Curtis and Christy Sinclair, "Law Times: Obligated to act on suspicion", *The Times*, London, 25th August 1992:

To avoid potential difficulties in proving knowledge of the money's origins, the EC directive requires the legislation to say this 'may be inferred from objective factual circumstances'. But what of the defendant who was insufficiently worldly to recognise the indicators?

¹⁷⁹ Reports of suspicious transactions made to the National Criminal Intelligence Service have risen from 1,981 in 1990 to 11,300 in 1992.

Paul Durman, "Bankers face jail over laundering: Institutions will need systems to deal with suspicious transactions", *The Independent*, London, 28th October 1993.

See also Ian Watson's interview with Ian Watt, who heads the Confidential Inquiries Unit at the bank of England:

Money Laundering: 'We receive a number of anonymous calls and suggestions of malpractice in connection to money laundering and all these have to be looked at seriously,' he says.... Watt's unit acts as a conduit to the NCIS.

Ian Watson, "City: The Bank's fraudbuster", *The Sunday Telegraph*, London, 20th June 1993.

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is covered.¹⁸⁰

These provisions breach the previously fundamental rule of Common Law - that every accused person is innocent until proven guilty. They also turn just about every member of staff in every financial institution into a part-time policeman.

Therefore the sudden mass of paperwork required to open a bank account in this country. The traditional two references are no longer enough. It is necessary to produce passports, driving licences, and so forth, to establish full proof of identity. Identity numbers from these documents are kept on file for future inspection.

Such safeguards as exist in the modern legislation are to protect the banks, not their customers - therefore the relieving of banks from civil liability to their customers for any disclosure of information to the authorities, or for not informing their customers of any such disclosure.¹⁸¹

All these regulations are intended for the detection and prevention of serious crimes - few of which, terrorism aside, are connected with attacks on life or property. But their extension, to allow an inspection and supervision of everyone, can be expected to follow as a matter of course. This is the opinion of Dr Michael Levi, Reader in Criminology at the University of Wales. He says:

It appears... as if the foundations of the international finance-police state are being

¹⁸⁰ Michael Curtis and Christy Sinclair, "Law Times: Obligated to act on suspicion", *The Times*, London, 25th August 1992.

¹⁸¹ *Barclay's Bank v Taylor; Trustee Savings bank of Wales and Border v Taylor* [1989] 1 WLR 1066. Banks are no longer under any contractual obligation to inform their customers that a production order has been made, or to say what has been produced.

In *R v Southwark Crown Court, ex parte Customs and Excise* and *R v Southwark Crown Court, ex parte Bank of Credit and Commerce International SA* [1989] 3 WLR 1054, it was held by the Divisional Court of the Queen's Bench, and upheld by the Court of Appeal, that a Circuit Judge had no authority to prevent the handing over of General Noriega's banking details by the British to the American authorities.

The ambiguous protections contained in the 1980s legislation were resolved in favour of the authorities, there being a paramount public interest in an efficient prosecution of the "war against drugs".

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laid. In six years [to 1989], the UK has moved from a legal position in which bank account details could be revealed only after the account holders had been charged, to one in which routine interchanges - court-authorised or not - take place between banks and a plethora of police and regulatory agencies.¹⁸²

The Effect of Such Laws

“Those with nothing to hide have nothing to fear” - this is the standard cry whenever objections are made to the growth of state inspection. Why should we be so worried about letting the authorities have access to our financial records? Assuming we are not drug dealers or terrorists or whatever, how can such powers be used to harm us?

The reply to all this is simple, and increasingly obvious. Even assuming the “War on Drugs” is worth fighting, there is no evidence that these laws will bring victory any closer. Let a criminal gather a large enough pile of cash, and there will always be some means available of laundering it. Bank officials are corruptible - if not here, then certainly in other countries. American power

¹⁸² Michael Levi, “The Regulation of Money Laundering: The Death of Banking Secrecy in the UK”, *The British Journal of Criminology*, vol. 31 (2), 1991, pp.122-23.

Things in America may be still worse. According to Mitch Radcliffe of Digital Media - available at dmedia@netcom.com, President Clinton is considering an executive order to allow the Internal Revenue Service to monitor individual bank accounts, and automatically collect taxes based on the results. This will be presented as saving people the trouble of filing their tax returns. Though asked to comment on this rumour the White House has apparently not yet done so.

For how these various regulations are applied, see Margaret Stone, “Money: Is it time to bring back the identity card again?”, *The Daily Mail*, London, 25th May 1994:

The Government has put building societies and banks in the frontline in the fight against drug trafficking, and it is now an offence for them not to make rigorous identification checks on anyone wanting to save or borrow money. Mortgages can be used to launder money if crooks take out a big loan and then use illegal cash to repay it quickly.

See also Liz Dolan, “Why the Halifax wouldn’t play with the bingo caller”, *The Times*, London, 18th June 1994:

Julio Bruno, a Spanish national who has lived and worked in Britain since last September, was branded a possible money launderer when he tried to open an Instant Xtra Plus account at his local branch of the Halifax Building Society in Croydon this month.

Mr Bruno says that all he wanted was a safe place for £1,000 cash and a cheque for £500 from the Inland Revenue, but his unwitting ignorance of tougher rules on opening accounts set off alarm bells with the building society. The cash was from his accumulated salary his employer pays all employees in cash and his landlord advised him to open a building society account because he was worried about burglars. ‘They gave me the money back over the counter,’ he said. ‘The place was full of customers staring at me. I felt really embarrassed and insulted. I am sure the other customers thought I had tried to pass off counterfeit money, or something.’

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and determination are still great enough to force most governments to go through the motions of passing money laundering legislation. But it cannot obtain uniform enforcement. So long as there are countries like Thailand, where different notions of privacy and dignity prevail, the means will remain - if at a price - of converting dirty cash into nice, clean share certificates and real property.

Of course, we are moving towards the abolition of cash transactions. Downward alterations, combined with inflation, will eventually reduce the present effective limit of £10,000, to force all but the most trivial purchases through the banking system. Long before then, however, the partly autonomous development of "digital cash" will have turned banknotes into museum exhibits. Then, it will in theory be possible to monitor every transaction, and thereby stop the sale of drugs and laundering of its proceeds at every point. The practice, I am sure, will be different. Where a trade this lucrative is concerned, human ingenuity will always find a way through or round the law.

This being said, the real victims will be us, the honest public. The enforcement of the money laundering laws will impose a total, if largely invisible, control over our lives.

First, there is an indirect control of the kind already possible. To be watched is in large measure to be deterred. Most of us desire the approbation of others - or, at worst, wish to avoid their condemnation. We therefore prefer to do in private many things which, though perfectly legal, might lower us in the opinion of others. The gathering and storing of information on us for commercial purposes is already far advanced. If ever they wanted, the Police could use their existing powers to learn from my bank or the record shops that I like classical music. Before the end of the century, they will be able to learn what I buy every Friday evening at my local Asda.

In the same way, my general practitioner might be able to learn if I buy cigarettes, or alcohol, or foods containing lots of cholesterol. After all, the National Health Service is short of money, and it must establish orders of priority for treatment. Already, smokers are sometimes denied access to treatment. As soon as it becomes possible to check if we are telling the truth about our

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lifestyles, I take it for granted that the power will be demanded and given.

The effect of knowing that our purchases are being - or simply can be - monitored will tend most of us to an obsessive conformity. It will produce a secular variety of Calvinism, where every life is made into a play - with not God as the audience, but our doctors and bosses and political masters.

Second, the final abolition of cash will allow direct controls. Cash has the advantage not only of anonymity, but also of fungibility - it can be used to make any payment. If I wanted, for example, I could draw out the money reserved for my next gas bill, and spend it all on silk underclothes. "Digital cash" allows all manner of purchases to be blocked or limited. It clears the way to lifestyle engineering on a scale that our present health activists can scarcely imagine. Pregnant women can be prevented from buying alcohol. Smokers can be put on a tapering ration of cigarettes. We can all be prevented from gambling away - or perhaps failing to save - more than a certain share of our incomes. With regard to our own earnings, we can be reduced to the status of an underage heir faced with a set of mean and inflexible trustees.

To deny that any of this will happen is at best to lack imagination. If history shows anything, it is that any power that becomes cheaply available will be taken and used by the authorities. No matter how ghastly or absurd, there has never yet been an exercise of power beyond plausible justification.

Conclusion

So far, the debate over illicit drugs has largely been a matter of arguing for or against the right to do with ourselves as we please. The making of laws against money laundering have turned it into an argument for or against the survival of our civilisation. People may continue to believe - against the best evidence - that the individual taking of drugs leads to a general social demoralisation. But they must now also decide which is the greatest evil - to leave drugs alone, or to push the war against them to its logical conclusion.

Chapter Nine

An Analysis of Two Books on Money Laundering by Sean Gabb 1,805 words

**First published in *Free Life*,
issue 23, London, August 1995**

International Efforts to Combat Money Laundering

William C. Gilmore (ed.)

Grotius Publications Limited, Cambridge, 1992, 335pp, £48 (pbk)
(ISBN 0 521 46305 X)

Money Laundering: A Practical Guide to the New Legislation

Rowan Bosworth-Davies and Graham Saltmarsh

Chapman & Hall, London, 1994, xii and 304pp, £49.50 (hbk)
(ISBN 0 412 57530 2)

The first of these books is a collection of treaties, plus other documents, concerned with the international fight against money laundering. The second explains how these treaties have been enacted into, and are enforced under, the laws of the United Kingdom. Both works will repay the closest study. In clear detail, they show the growth of what must be called a New World Order, and how, without some interposing cause, this may produce a universal slide into despotism.

The fight against money laundering begins with realising that the “War on Drugs” has been lost. When goods are portable and easily concealed, and when demand for them is strong enough to bear almost any cost of bringing them to market, the main effect of prohibition will be to put a

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bounty on crime. For all the efforts of the past three generations, illegal drugs are available in most high security prisons. In much of the West, street prices have been stable or even falling since 1980.

The official response, however, has not been to give in and legalise the trade, but to expand the War to a front where previously there had been few hostilities. While keeping up their efforts against the trade itself, the authorities have turned increasingly to confiscating its proceeds. This new approach has three alleged benefits:

First, it will deprive criminals of their incentive to enter and remain in the trade;

Second, it will allow the punishing of those in charge of the trade - people who never touch or see illegal drugs, but to whom the main profits ultimately flow;

Third, it can make the War on Drugs self-supporting, and perhaps yield a surplus for other public spending.

There is, however, one practical difficulty. Before the authorities can confiscate the money, they must find it. To do this, they must keep it from being merged beyond recall into the general flow of investment. This involves ending bank secrecy and imposing a mass of financial regulation. Now, most people - especially the rich - dislike having their lives pried into. Nor do banks like higher costs and limitations on what business they can do. And so, given the present freedom of capital markets, no government acting alone can afford a strict policy of confiscation. It would, sooner or later, cause a flight of transactions to more liberal places.

The solution has been to try making everywhere in the world equally illiberal. Such was the purpose of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Narcotic Substances, signed in Vienna in December 1988 [full text in Gilmore, pp.75-97]. This is one of the most important international treaties of the past 50 years. It not merely requires its signatory states to criminalise the laundering of drug money, and to confiscate it where found, but lays

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down so far as possible a common wording for the criminal statutes, and a common mode of enforcement. It also requires full and prompt cooperation between the signatory states for the enforcement of these laws anywhere in the world.

The Convention had little direct or immediate effect on British law. Many of its requirements, indeed, had already been met in the Drug Trafficking Offences Act 1986. Most others were only met in the Criminal Justice Act 1993, which enacts the European Community Directive of 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering [full text in Gilmore, pp.250-67]. This itself derives from the Vienna Convention only through the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 [full text in Gilmore, pp.177-91]. Even so, this country is fast becoming a financial police state of the kind agreed at Vienna - and where the process cannot be traced to the Convention, it can be traced to the same international pressures of which the Convention is itself a result.

Let me explain. When I talk about a New World Order, I do not mean some grand conspiracy of bankers, or Jews, or Illuminati, or even - with far more probability - the American Government. There are countries where policy is largely dictated from outside. But for rich and powerful countries, the truth is more complex. Most international obligations imposed on this country, for example, were not only consented to by our rulers, but were usually proposed by them, and are enforced by agencies in which our own countrymen often occupy senior positions.

Where others see conspiracies, I see public choice economics. Whenever a government tries to do something dangerous or unnecessary, like banning drugs or educating the poor, it must set up an agency through which to spend the allocated funds. Once employed, the agents will - as if directed by an invisible hand - start to find more and more justifications for expanding their status and numbers. They collect the statistics. They know which ones to publish and which to hold back. They are the politicians' first and favoured source of advice. They have their pet journalists. They trade favours with the relevant interest groups. They know exactly how to give themselves a pleasing life, and how to see off threats to it. Unless the money runs out, or the

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public turns really nasty, they can write their own budget cheques.

By natural extension, the same is now happening at the international level - though with potentially far worse consequences. In the first place, there is limitless money: budgets would need to swell unimaginably large to reach even one per cent of gross planetary product. In the second, public anger seldom crosses borders; and, if all else fails, the politicians and bureaucrats in one country can shelter behind the excuse of treaty obligations that cannot be unilaterally be cast off - not, at least, without consequences more horrible than words exist to describe. Third, the enforcement of international treaties means the growth of what is in effect an international bureaucracy. The local enforcers of a treaty may be citizens of the signatory states, who will live and work in their home countries, and may even occupy positions in the domestic administration. Yet these are people who, by virtue of the agreements they enforce, and the contacts they make and maintain in other countries, are members of an international order. And, in at least the case of money laundering, they will share an agenda that is often deeply hostile to their native institutions.

This can be seen - expressed with almost naive honesty - in the book by Messrs Bosworth-Davies and Saltmarsh. Both are British police officers: the latter is a departmental head at the National Criminal Intelligence Service. Both take it for granted that the world needs an international police force. Both are unable to believe that anyone can disinterestedly object to the necessary harmonisations of law, and the corresponding abolition of Common Law protections. They “know one senior clearing banker who has described this [money laundering] legislation as the nearest thing he has experienced to ‘McCarthyism’...”[p.172] Of course, they see things differently. The legislation

discloses, on mature reflection, a set of carefully structured laws which, with good will, due diligence and a modicum of responsible attention from the industry as a whole, should not prove too burdensome. Indeed, the authors believe that some of the regulatory requirements have been diluted too much already, in a misguided attempt to placate the sensibilities of certain sectors of the industry....[*Ibid.*]

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With people like this advising the politicians and lecturing the rest of us, little wonder the Drug Trafficking Offences Act predates the Vienna Convention by two years! Though they will hotly disagree - and even perhaps consider a libel writ - Messrs Bosworth-Davies and Saltmarsh cannot be regarded as our countrymen. More at home in a gathering of Bulgarian or Filipino police chiefs than with any of us, they are foreigners with British passports.

Somewhat less honest, though still interesting, is the Explanatory Report of the Committee of Experts who drafted the Council of Europe Convention [full text in Gilmore, pp.192-237]. Though formally subordinate to a committee of the various European Ministers of Justice, these experts plainly saw their first duty as lying elsewhere. Call it “the international community” or their own order, their duty was collective and not to any single country.

Look at their dislike of the narrow focus of the Vienna Convention. They wanted something that would also allow confiscation for

terrorist offences, organised crime, violent crimes, offences involving the sexual exploitation of children and young persons, extortion, kidnapping, environmental offences, economic fraud, insider trading and other serious offences. [Gilmore, p.204]

But they had to concede that not every European country might like its own laws against these acts to be written by an international committee. And so they allowed each signatory state to reserve whatever of these acts to its own legislative process.

The experts agreed, however, that such states should review their legislation periodically and expand the applicability of confiscation measures, in order to be able to restrict the reservations subsequently as much as possible. [*Ibid.*]

And this is only the beginning. As yet, the shape of world government exists barely in outline. But the tendency ought to be plain. Power is moving from national - and mostly democratic - governments to unaccountable and even invisible bureaucracies. Liberal institutions that are often the work of ages are being hammered into the transmitters of unlimited power. We are

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beginning to know how people in the Greek city states felt after absorption into the Roman Empire.

When the American militiamen cry out that the United Nations is about to invade in black helicopters and plant microcomputers in their bottoms, I am at least sceptical. This is not the New World Order that I see. What I do see is actually worse. We can shoot the helicopters down, and dig out the microcomputers, and put the ringleaders on trial. We can go about playing the hero of our choice from *Star Wars*. But in the real world, there is no Death Star to blow up - no Darth Vader to push into the void. There is just a huge, elastic network of people, all acting in what they believe is the public good, most with some degree of public support.

How this kind of despotism can be resisted is another question, and I have said enough already. But I will repeat - the books here reviewed do repay a very close study. At the very least, it is useful to see the enemy's future plan laid out in such detail.

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EurOmega Project: A Bill of Rights for Europe: Could the US Constitution Provide Pointers for the Future of Europe?

By Sean Gabb
17,859 words

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INTRODUCTION

During the next fifteen years, it is almost inevitable that the newly liberated nations of Eastern Europe will seek and obtain admission to the European Community.¹⁸³ There are some statesmen to whom this is a gloomy prospect. Until the autumn of 1989, it seemed that the Community had reached the limits to its further expansion. All that seemed to remain was to merge its constituent parts into a single political whole, federal in name, but bureaucratic and centralised in fact. The collapse of the Soviet Empire has frustrated this plan. The nations of Eastern Europe are already applying for membership. Who will be able to resist them more than a few years? As Margaret Thatcher has said: "We can't say in one breath that they are part of Europe, and in the next our European Community club is so exclusive that we won't admit them".¹⁸⁴ She has already committed the British Government to their support. When once before she described her vision

¹⁸³ There are in fact three Communities - the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community. These three were amalgamated in 1967, since when the official title has been the European Communities. The title European Community, or its contraction by dropping the adjective, has no formal basis, and was first used in this country by the federalists. In spite of this, its use by the Prime Minister may be taken as having legitimised it.

¹⁸⁴ From her speech of the 5th August 1990, given at Aspen in Colorado, as reported in *The Daily Telegraph*, 6th August 1990.

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of how the Community should develop, she was variously laughed at and denounced. Now, it looks as if that vision will become reality. Our children may grow up not in a United States of Western Europe, but in a vast Europe of nations, extending from Lisbon to the Urals, independent but also joined by a common faith in democracy, free enterprise and the rule of law.

In the same speech, Mrs Thatcher also proposed that there should be a “European Magna Carta”, to “entrench for every European citizen, including those of the Soviet Union, the basic rights which we in the West take for granted”.¹⁸⁵ This is a splendid proposal, and one that ought to be taken up without delay. We suggest only one alteration to it. The Prime Minister’s intention appears to be for this document to be adopted at a meeting of 35 European nations, East and West. With all respect, we recall that the Helsinki Declaration of 1975 was adopted at a similar type of international gathering; and, notoriously, it remained a mass of fine words on paper. The Balkans apart, it may be that tyranny has vanished, or is vanishing, from the Continent. It may be that Declarations will in future be paid more respect than in the past. But an entrenched Bill of Rights, by its nature, requires constitutional machinery for its enforcement. Accordingly, it strikes us as by far the most economical and durable arrangement for the Bill to be incorporated into the Treaty of Rome, then to become part of the national law of each new member state. The obvious time and place for doing this is at the Community intergovernmental conference that is to meet this coming December to discuss political union. Beyond this one alteration, the proposal is without fault. It is the noblest reponse by any head of government to the Glorious Revolution in the East. It is not for a Magna Carta, but for a Maxima Carta. Given effect, it would mark the real beginning of the new Europe. Beyond its declaratory value, it would produce two benefits.

¹⁸⁵ *Ibid*

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THE BENEFICIAL EFFECTS

Eastern Europe

In the first place, it will fix the liberties of Eastern Europe. The peoples there have just overthrown some of the most hateful tyrannies that ever existed in the civilised world. They want freedom and they want the prosperity that only freedom brings. But desire by itself may not be enough. Freedom, if it is to last, requires a strict rule of law. It requires a willingness to govern, and be governed, in accordance with laws definite in meaning and universally applicable, laws published in advance and interpreted by independent courts - laws that it will not in every particular case seem advantageous to observe¹⁸⁶. It requires essentially an avoidance of government by short cut: and in no other part of Europe will governments be so tempted as in the East to take short cuts.

There are political criminals to be punished. There is confiscated property to be put back into private hands. There are innumerable other problems to be solved. At any time - but above all after a revolution - what is expedient may not always be what is just. Unless reinforced in some way, the desire for a great but unspecific benefit, enjoyable over time, is often weaker than the desire for a lesser but more specific benefit, enjoyable at once. Certainly, new constitutions are

¹⁸⁶ On this point, see David Hume:

The happiness and prosperity of mankind.... raised by the social virtue of justice and its subdivisions, may be compared to the building of a vault, where each individual stone would, of itself, fall to the ground; nor is the whole fabric supported but by the mutual assistance and combination of its corresponding parts.

All the laws of nature, which regulate property, as well as all civil laws, are general, and regard alone some special circumstance of the case, without taking into account the characters, situations and connexions of the person concerned, or any particular consequences which may result from the determination of these laws in any particular case which offers. They deprive, without scruple, a beneficent man of all his possessions, if acquired by mistake, without a good title; in order to bestow them on a selfish miser, who has already heaped up immense stores of superfluous riches. Public utility requires that property should be regulated by general inflexible rules; and though such rules are adopted as best serve the same end of public utility, it is impossible for them to prevent all particular hardships, or make beneficial consequences result from every individual case. It is sufficient, if the whole plan or scheme be necessary for the support of civil society, and if the balance of good, in the main, do thereby preponderate much above that of evil. (Appendix III to *An Enquiry Concerning the Principles of Morals* (1749), Oxford University Press, 1957, p. 305)

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being drafted in the East. Doubtless, they will contain all the usual guarantees of due process and individual rights. But written constitutions alone have never restrained power. If amendable, they will be amended. If not, they will be swept aside by a fresh revolution. The experience of the past two centuries, if it has shown anything, has shown this repeatedly.

The best reinforcement by far of the rule of law is that provided by tradition. There is in the average human mind a strong and often useful association between what always has been and what always must be. Nothing else has ever served so well to keep not merely a government but an entire people to the path of right and justice. Where such a tradition exists, it is the clear duty of any liberal to defend it and hold it up for popular veneration. Where one has previously existed but been lost, the duty is to seek by all means possible to revive it.

But Eastern Europe has no tradition of constitutional government. That part of the Continent was always the least populated and the most backward. Even when benevolent, its rulers were always despotic. Only towards the end of the last century were free institutions allowed to develop. Without exception, these were quickly destroyed.

During the first half of this century, the constitutional traditions of almost every European country were submerged by a great flood of tyranny. But those of the West were old and solid. Those of the East were new and flimsy. The West had National Socialism, the East had both National Socialism and Soviet Socialism. In the West, the waters soon receded, leaving the buildings damaged but largely intact and capable of repair. In the East, the waters were dammed in for two generations. When after a great struggle, the dam was broken and the land drained, nothing was found but rubble. A new beginning must be made. This will be made all the sooner for what help can be given from the West.

It must be made absolutely clear to the new legal governments of Eastern Europe that there are certain standards of conduct to be met before their countries can be admitted to the Community. A Community Bill of Rights would allow no mistake to be made as to these standards. Just as at present a country prepares for entry by imposing VAT and subsidising its farmers, so in future

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one will prepare by adopting and scrupulously observing the Bill of Rights. The restraints that cannot be provided by tradition must be provided instead by economic interest.

Western Europe

In the second place, the liberties of Western Europe are in need of fixing. For, despite their age and solidity, the constitutional traditions of the West have been subject to erosion. Though great, the evils of National Socialism were transient. But the lesser evils of democratic socialism have been more continuous. In many respects, the twin doctrines have come close to prevailing - that the immediate will of a majority should never be frustrated, and that the best government is the one that governs most. No Western country has yet been transformed into a majoritarian tyranny; nor is it likely that one will be so transformed in the foreseeable future. But it cannot be denied that neither economic freedom nor the rule of law is fully respected in any of the member states of the Community.

Great Britain

The Existing Safeguards of our Liberty

Perhaps the worst offender in this respect is Great Britain. Unlike all of our Community partners, we have no formally entrenched laws. In the past, we had no need of them. Without a written Constitution or Bill of Rights, we enjoyed a wider and more secure freedom than any European people¹⁸⁷. The rule of law that they have been, and are, struggling to realise, we once enjoyed as an immemorial birthright, and in its fullest and most perfect development. Some of that birthright we still possess. It has always been the main protection of our rights.

¹⁸⁷ We do actually possess a Bill of Rights. This was passed in 1689, following the Glorious Revolution. But, unlike the first ten amendments to the American Constitution, it is neither entrenched nor general. Instead, it enumerates and condemns the illegal acts of James II. It is of greater historical than legal importance.

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We have, for example, no explicit right of freedom from arbitrary arrest and detention. But in England, it is still generally the case that no one may be punished or made to pay damages except for a distinct breach of the law established in the normal legal manner before the ordinary courts. No public official, for whatever reason, is permitted to exceed those powers. If he does exceed them, he becomes liable to an action for damages in the civil courts or to a criminal prosecution. For there is in our law no general discretion allowed to the authorities. Neither administrative practice nor even state necessity is accounted a good defence by the courts. But each interference with life or property is excused only if it can be justified by statute or by some principle of the common law. In defect of justification, it is accounted a trespass no different in nature from any similar committed by a private person.

Again, there has never been an explicitly stated right of free speech. No aggrieved editor has been able to go into Court and produce a Constitutional guarantee of his right to publish. Instead, there is no special law relating to the press. No one is required to take out a licence before starting a newspaper, or provide a bond for any damages that might be awarded against him, or submit copy in advance of publication to a government censor. There is no legal distinction between the Editor of *The Times* and anyone who sticks a poster in his front window. Either who breaks the law is answerable in the ordinary courts by exactly the same process.¹⁸⁸ Otherwise, publication is entirely free.

The Chief Danger to Our Liberty

Above the courts, however, stands an absolutely sovereign Parliament. It possesses, said Dicey, “the right to make or unmake any law whatever; and... no person or body is recognised by the law

¹⁸⁸ “The law of England is a law of liberty, and consistently with liberty we have not what is called an imprimatur; there is no such preliminary licence necessary; but if a man publish a paper, he is exposed to the legal consequences, as he is in every other act” (per Lord Ellenborough in *R v Cobbett* (1804) 29 *State Trials* 1).

This is no longer entirely true. The Law of Libel Amendment Act 1888 and the Defamation Act 1952 both extended the protection of privilege to various classes of report published in a newspaper or broadcast. The 1888 Act also frees the press from prosecution for any blasphemous or seditious libel except with the leave of a High Court Judge given in chambers. Thus *The Times* has a greater freedom to comment on public events and persons than a poster writer. But it remains the case that our law has no equivalent of the special status accorded to the press even in most European countries.

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of England as having a right to override or set aside the legislation of Parliament.¹⁸⁹ It could put a man to death today for having done yesterday what was not illegal. It could repeal the Act giving India Independence and appoint a new Viceroy. It could enact that the square of the hypotenuse was not equal to the square of other two sides. These laws would all be accepted as binding in the British courts.

During the 18th and 19th centuries, these incompatible doctrines, of the rule of law and of Parliamentary sovereignty, were held together by political self-restraint. Though Parliament could do as it pleased, it seldom passed laws in derogation of rights protected by the common law. But this self-restraint derived from a set of traditions that have throughout this century gradually decayed. Today, the two doctrines stand in mutual opposition. Whoever holds one cannot in all consistency hold the other. Anyone who supports the rule of law as it has developed in England and been admired and often copied throughout the world - and that means all liberals and many members of the Conservative Party - is bound to fear the unbridled legislative supremacy of Parliament.

The Structure of Parliament

To be sure, formal sovereignty rests with the Crown in Parliament as a whole; and the old theory of the Constitution placed much emphasis on the limitations on power produced by its separation. But the Lords have not been co-equal with the Commons since the 17th century. The Acts of 1911 and 1949 only effect by statute what had long ago been largely effected by convention. No Monarch since Queen Anne has rejected a Bill that has passed through both Houses. No Monarch since George III has intervened to procure the defeat of a Bill in either House. No Monarch since William IV has dismissed a Ministry. All these powers remain to Her present Majesty. But they

¹⁸⁹ A. V. Dicey, *The Law of the Constitution* (1885), Macmillan, London, 8th edn 1915, p 38. Again, this is not entirely true. In 1610, Lord Chief Justice Coke set aside an Act of Parliament on the grounds that it breached the common law principle that no man should be judge in his own cause. "In many cases" he declared, "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void" (Dr Bonham's case, in *Coke's Reports*, volume 8). In 1702, Lord Chief Justice Holt set aside another Act - though the report of this is too brief for his reasoning to be studied with any surety. All the recent cases have confirmed Dicey's opinion. But it may one day be possible, given an extreme instance of misgovernment, for the old common law supervisory power to be revived.

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are powers that could be used only in a crisis, and only after it was clear that the existing Ministers had lost all public confidence. Practically, sovereignty is and has long been possessed by the House of Commons.

Political Convention

There is the more recent doctrine, that our rights are protected by the conventions of everyday politics.

First, Members of Parliament are said to keep a close and jealous watch on the Bills that are brought before them. Their duty is to have at heart the interests of their constituents and of the people at large. But this has become another constitutional fiction. The average Member is a political appointee. His seat is, by means more or less direct, in the gift of his party leaders. He is paid a salary that may constitute his entire income. He probably wants office; and that is earned as much by docility as by ability. Accordingly, he will vote for or against Bills just as his leaders tell him. There are some independent spirits on the back benches. But these are unable to keep more than a perfunctory watch on what is enacted. The current Parliament adds at least 3,000 pages every year to the statute book, and allows another 2,000 separate Statutory Instruments. No one can absorb all this torrent of paper. Quite often, no one so much as reads it for logical or grammatical flaws; and the Judges are left to find a meaning in an Act where the drafters themselves would have trouble explaining one.

Second, Members are said to keep watch over the executive. No one may go into court and call a particular Act in question on the grounds of its repugnance to some fundamental law. But he may seek through his Member to have a grievance aired in Parliament and have the relevant Minister or Ministers called to account. In 1987, Stuart Bell MP was approached by a number of parents whose children had been taken away from them by the Cleveland Social Services Department. On investigation, it was revealed that they had been taken without good cause. His investigation led to a full judicial inquiry and the disgrace of the doctors and officials responsible.

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As a direct consequence, the law was changed in 1989 to prevent similar abuses of power.¹⁹⁰

But the Cleveland Affair was an exception to the rule, not an illustration of its working. It remains that most members are not in fact independent. One who sits on the Government benches will not gain what is accounted by the Whips a good name if he passes his time in exposing abuses of power, or in supporting calls for their investigation and suppression. One who sits on the Opposition benches will usually have more freedom of action. But it must be remembered that his leaders, while they have an undoubted interest in embarrassing the Government, have none in undermining or diminishing the powers that they hope in time to have for themselves. Nor has at least the Labour Party any wish to draw attention to those many kinds of abuse that are perhaps inseparable from overgovernment.

Even allowing that members do occasionally follow the dictates of conscience, it does not follow that redress will invariably be obtained. Accountability can be avoided by a Minister's invoking the rule that where the national security is concerned - and the definition of what is the national security is for him alone to make - no explanation can be required. In itself, the sinking of the General Belgrano during the Falklands War was a wise and proper act. But the succeeding prevarication over why and when the decision to sink it was taken shows the ineffectiveness of even the most single-minded determination to have a question aired in Parliament that a government does not want aired.

General Elections

There is one check that cannot be ignored. At least once in every five years, a new House of Commons must be elected. If the Government is incompetent or pays too little regard to public opinion, it will find itself out of office. But, while our representative system does tend to prevent excessive misgovernment, it should not be mistaken for more than it is. Democracy and limited government are usually found together, but are not synonymous. Except in those countries where

¹⁹⁰ The new law has not prevented what looks like a very similar abuse in Rochdale.

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backwardness and modernity are mingled in the wrong proportions - where none but the stupid can honestly advocate the introduction of democracy - a majority will not trample on its own favourite rights. It can and often will trample on those of a minority.

Here, certainly, voting will not restrain mild misgovernment. If anyone is discontented with a Conservative Government, his only real alternative is to vote for a Labour Party that for all its most recent contortions is still recognisably and dangerously socialist.

Judicial Review

There is one reasonably effective check on Parliament. This is provided by the courts. Of course, they cannot set Acts aside or do other than give effect to the will of Parliament as stated in an Act. But they are often able to interpret the will of Parliament in ways that no government would have expected. This ability has not been diminished, but has even increased during the present century.

The greater part of our modern law is not contained in Acts of Parliament, but is made by Ministers under powers conferred by enabling legislation. This delegation is justified on the grounds - first, that Parliament is troubled enough nowadays by discussing the principles of a new statute, without considering its minute applications; and second, that these applications are more efficiently made by the relevant officials than by the politicians. It is doubtful whether we really need as many as a hundredth part of the new laws made since around 1914. But, granting for the moment that they are needed, there can be no objection in principle to the manner of their making.

For a time, until about the 1950s, an effort was made to exclude the supervision of the courts from this species of executive action. Powers were conferred on Ministers - or in practice on civil servants - to make regulations closely affecting the rights of the subject. Any dispute as to the meaning of these regulations was generally referred to an administrative tribunal run by the very

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officials who had made and who were applying them. Few accusations were made out of corrupt or incompetent adjudication. Yet a great breach had been opened in the principle, that it is for the courts to decide whether a certain power has been lawfully exercised. The enabling Acts of the day regularly included the words or equivalent - "and the decision of the Minister shall not be called in question in any court of law".

But this dangerous course has been blocked. In their courts, in the House of Lords, and on one notable occasion by pamphlet¹⁹¹, its final destination was exposed and warned against by the Judges. Enabling Acts were inventively construed to permit appeals from the administrative tribunals to the courts.¹⁹² Finally, with the passing in 1958 and 1971 of the Tribunals and Inquiries Acts, the supervisory power of the courts over the whole administration was reaffirmed. Today, there is an established right of appeal from a tribunal to a special panel of Judges drawn from the Queen's Bench Division of the High Court. One effect of these reforms has been to give to the courts a limited power to set aside bad legislation.

If any attempt is made to enforce a delegated law against him, an aggrieved subject has two means of seeking redress. He can argue before the relevant tribunal that it does not apply in his particular case, and is then able if he thinks fit to make an appeal to the courts. Or he can go straight into court and contest the validity of the law. If its substance or form is held not to have been sanctioned by the enabling Act, or it is held in any other way to be procedurally defective, it may be set aside. Thus, in 1969, the House of Lords set aside the Industrial Training (Hotel and Catering Board) Order 1966, made by the Minister of labour under the powers conferred on him by the Industrial Training Act 1964. The Order was held to have gone beyond what had been allowed by the enabling Act.¹⁹³

¹⁹¹ Lord Hewart of Bury (Lord Chief Justice of England), *The New Despotism*, Ernest Benn Limited, London, 1929.

¹⁹² See, for example, *Anisimic Ltd v Foreign Compensation Commission* [1969], *All England Reports* 208. The Plaintiff applied to the Defendant to be compensated for the loss of its property in Egypt during the Suez crisis. Its application was rejected. The Foreign Compensation Act 1950 had sought to block appeals from the Commission by declaring that its decisions should "not be called into question in any court of law". An appeal was made even so. Finding that the Commission had in this case exceeded its statutory powers, the House of Lords held that the decision was void on the grounds that it was not really a decision. By clever construction, a principal clause of the Act was disregarded.

¹⁹³ *Hotel and Catering Industry Training Board v Automobile Proprietary Ltd* [1969], 2 *All England Reports*, 582.

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The growth of judicial review has been one of the most heartening developments in our modern law. It is even possible that, left alone, the courts will eventually bring Parliament under effective control. But they are far from having done this yet; and it is unlikely that they will be left alone to chip away at the legislative supremacy of Parliament. In any likely contest between the Judges and the politicians, it must never be forgotten that the latter have the final say. They cannot protect their delegated laws. But, if they feel so inclined, they can always re-enact it as primary law, and stop every judicial breach by regular amendment. So far, the only real contest has been over financial legislation. But this alone shows how little real protection the courts can provide against a determined majority in the House of Commons.

Omnipotent Government

The old traditions are not dead. There remains in this country a strong regard for the rule of law. But it is very largely an abstract regard. When it comes to the making of specific decisions, the talk is more of the object immediately in view than of the general consequences. People are often alarmed when they hear that some vital principle of the Constitution is being violated; but almost equally often are quieted by a few emollient words from the promoters of the violation about how nothing essential is being changed, and by a view of what is allegedly to be had in return. At first, 90 or 100 years ago, the violations seemed trifling and the gains enormous. But, as the precedents accumulated, and the old tradition faded, the balance of cost and benefit tended towards equality. Now, the balance has been reversed, and the most arbitrary means are tolerated for the achievement of the most commonplace or superfluous ends. The Government nowadays is both allowed and expected to take short cuts.

It may be a British Prime Minister who is calling for the rule of law to be entrenched throughout Europe. But there are many Acts of Parliament proposed by her and her colleagues that would undoubtedly be struck down by any court interpreting a Bill of Rights. They have begun to take away the right to silence. They have reversed the burden of proof in a large class of criminal prosecutions. They have allowed the imposition of penalties without any kind of trial. They have established a censorship in respect of video recordings without precedent since Stuart times. It

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would be very much in our interest to place some kind of check on the legislative supremacy of Parliament.

The Impossibility of Entrenched Legislation

But the question is, how such a check could be placed. Parliament is sovereign; and the corollary of this is that it cannot abridge its sovereignty, which is absolutely transcendent of any particular Act. An individual may put himself in handcuffs and throw away the key. Parliament cannot bind itself. It can do anything else, but it cannot do that. No matter what bonds it might place on its future action, it could throw them off as if they were no more than cobwebs. It might enact the most perfect Bill of Rights that ever existed. It might provide that no Article of that Bill should be repealed or amended but in a specific manner. It would all be useless. Amendment or repeal would remain possible by ordinary legislation. For the courts will apply any Act of Parliament except one abridging its sovereignty. Where two Acts conflict, they will always give effect to the most recent one; and they will do so regardless of whether it was passed in an irregular manner. They may check the Parliament roll to see whether it has passed both Houses and received the Royal assent. They have no power to enquire beyond that. They will not look into the internal procedures of Parliament. “If an Act of Parliament has been obtained improperly” said Mr Justice Willes, “it is for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to obey it”.¹⁹⁴

Nor could a Bill of Rights be safe even from accidental repeal by an ill-drafted later Act. The courts would follow a rule enjoining them to construe any later Act so far as possible not to conflict with the Bill. Beyond that limited restraint, they would apply the later Act. “The Legislature cannot, according to our constitution” said Lord Justice Maugham, “bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal”.¹⁹⁵

¹⁹⁴ *Lee v Bude & Torrington Railway Co* (1871) 6 *Common Pleas Cases*, 582. This doctrine was reaffirmed by the House of Lords in 1974, in the case of *Pickin v British Railways Board*, ([1974] *Appeal Cases*).

¹⁹⁵ *Ellen Street Estates Ltd v Minister of Health* [1934] 1 *King's Bench Reports*, 753.

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Under better circumstances, a Bill might still be worth enacting. Though legally unenforceable, it might still provide a certain moral restraint on a Parliamentary majority. Its provisions could still be overridden. But the explicitness of the violation of rights involved might limit the number of such overridings. A white line dividing one garden from another may be less satisfactory than a wooden fence. But any boundary mark that shows where lawful enjoyment ends and trespass begins is better than nothing at all. A Conservative government might well have trouble in persuading its supporters to pass a contravening Act. Circumstances, though, are not better. The Conservatives are not the only party of government. There is also a Labour Party strongly opposed to the putting of any limits on Parliamentary sovereignty. It is realised - and correctly - that any such limitation would hold up the transformation of this country into a socialist state. In the 1960s, Alex Lyon, then the Labour Member for York, opposed the introduction of a Bill of Rights on the grounds that the resulting "inflexibility of our machinery for changing the law when obvious social injustice appeared, would make it a gravely retrograde measure for human liberty" (sic!).¹⁹⁶ More recently, Roy Hattersley, the Labour Deputy Leader, has claimed that "true liberty requires action from the government", and that a Bill would obstruct the achievement of "positive freedom"¹⁹⁷. One might restrain a Conservative government. It would be laughed at by a Labour government.

It is always open for our present absolutely sovereign Parliament to abolish itself - to adopt a wholly new constitution, in which it would be reconstituted as a less powerful body. Then its Acts could be reviewed by the courts, just as those of Congress are open to review by the Supreme Court of the United States. But to do this would be to break one of those precious threads of continuity that bind the generation now alive to every other that has lived in this country back into the high middle ages. Radical change of this nature is something to be flinched from except where clear and present danger requires it, and where it can be achieved largely by consent. Perhaps this first condition is satisfied. As we write, it appears highly likely that the

¹⁹⁶ Quoted, Michael Zander, *Bill of Rights?*, Sweet and Maxwell, London, 1985, p. 4. Chris R. Tame also quotes this in his powerful essay, "The Case Against a Bill of Rights", in *South African Freedom Review*, Summer 1988, pp 19-33. We will try to consider his main arguments later in this paper.

¹⁹⁷ *The Guardian*, 12th December, 1988, cited Tame, op. cit., p. 28.

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Labour Party will form the next government. The second, obviously, is not satisfied. Any changes made by the present Government will be seen as Conservative legislation, to be resisted now, and then somehow to be repealed. There is no hope, so far as our domestic politics are concerned, of a good and lasting settlement.

But there is an external hope. Our membership of the European Community cuts through these problems. The debate over entry was long and extremely painful. But that debate is over, and we have entered. The British Government has signed the relevant treaties, and we are all bound by them. There is now in Europe an authority that Parliament cannot remodel or abolish, and of which it must take notice.

COMMUNITY AND BRITISH LAW

The main object of the Community is the promotion of free movement between the member countries, of goods, services and persons. To achieve this object, a central Commission, together with a Parliament and Council of Ministers, is established in Brussels. The various ordinances issued from here take precedence over national law throughout the Community. In the event of any dispute concerning these ordinances or the founding treaties, the European Court of Justice is established in Luxemburg. Comprising 13 Judges - one from each member state plus one other - it has jurisdiction throughout the Community, and its judgments take precedence over those of any national court. We are bound to obey the decisions of these foreign institutions. Sections 2(1) and 2(4) of the European Communities Act 1972 provide that

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom, shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies. The provision that may be made under subsection (2) above includes, subject to Schedule 2 of this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to

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be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

By this first sub-section, all those provisions of Community law which are to be applied in this country are to be given the force of law in our courts. By the second, these provisions are to be given precedence not merely over those Acts of Parliament passed before the coming into force of this Act, but also over those passed after it. Any conflict between these sub-sections and another Act are taken before the courts by the same procedure by which a judicial review is sought of administrative action: application is made to the Queen's Bench Division.

It is untrue that our membership of the Community has ended the ultimate sovereignty of Parliament. The European Communities Act is not entrenched legislation. It may be repealed or amended like any other Act. It must, however, be regarded as politically untouchable. To repeal or amend it, except as required by Community law, would be to leave the Community. It may be that withdrawal combined with a policy of unilateral free trade would be greatly in our interest. But no likely British government will ever believe this. Pending withdrawal or substantial reform, Parliament has chosen to lend some part of its legislative power to the Community.¹⁹⁸ Nothing, then, may have changed so far as the strict legal theory of the Constitution is concerned. Even so, there are now the practical means available for placing restraints on the laws that Parliament can make.

The Supremacy of Community Law

No British court as yet has struck down an Act of Parliament on the grounds that it conflicts with

¹⁹⁸ This, at least, is the view taken by Mr Justice Hoffmann in the cases of *Stoke-on-Trent City Council v B & Q plc* and *Norwich City Council v B & Q plc* (Chancery Division), reported in *The Daily Telegraph*, 18th July, 1990. See also per Lord Denning MR in *Macarthy's Ltd v Smith*: "if the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty [of Rome] or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament" ([1979] 3 *All England Reports*, 325).

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Community law. But the principle, that the courts of each member state have this power, has long since been established in the case law of the European Court of Justice.¹⁹⁹ It can only be a matter of time before it is applied in this country. In one respect, indeed, the way is unambiguously open to its application.

Early in 1989, a group of companies, incorporated under the laws of the United Kingdom but owned or controlled by Spanish interests, began proceedings in the High Court against the Secretary of State for Transport. The companies were the owners or operators of 95 fishing vessels registered in the Register of British Vessels under the Merchant Shipping Act 1884. The system of registration was altered by Part II of the Merchant Shipping Act 1988 and a subsequent regulation made pursuant to the Act. The intention of the new law was to prevent the fishing in British waters by vessels flying the British flag but lacking any real link with the United Kingdom. The companies claimed against the Secretary of State that, by discriminating between one class of Community citizens and another, Part II of the 1988 Act was in breach of Community law, and should therefore be set aside. Since it was expected that some while would pass before final judgment in their application - since the case was to be referred to the European Court for a preliminary ruling on the issues of Community law raised - the companies sought an interlocutory injunction, to suspend Part II of the Act and permit them to continue fishing.

Had the Defendant been any party but the Crown, an injunction would have been granted. The companies had an arguable case. If they succeeded in their claim, but had been forbidden to fish meanwhile, no grant of damages would compensate them for their loss. To let them continue fishing was to preserve the *status quo*. An injunction was granted by the High Court. On appeal by the Secretary of State, however, the Court of Appeal applied the traditional rule, that no British court could suspend an Act of Parliament. On further appeal, the House of Lords upheld the Appeal Court judgment, adding that at common law no injunction could lie against the Crown. These questions were then submitted to the European Court, for answers to be given

¹⁹⁹ See, for example, *Costa v ENEL* [1964] European Community Reports. The Italian government had nationalised the production and distribution of electricity and transferred the assets of the old private companies to a state monopoly. Costa, a shareholder in one of the old companies, sued in Luxemburg, claiming that, although passed subsequently, the nationalisation breached the Treaty of Rome. The Court agreed. Community law was held to prevail over subsequent incompatible national law.

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independent of the main case already referred to it.

In its judgment, given on the 19th June 1990²⁰⁰, the European Court held that it was for the national courts to ensure the availability of the legal protections to which people had a right under Community law. It held that any national law or practice that prevented the national courts from ensuring the availability of these legal protections was incompatible with Community law. It held that any national law or practice that prevented the granting of interim relief to ensure the full effectiveness of a judgment to be given on the nature of these legal protections was also incompatible. Where questions of Community law were concerned, it was held that the common law rule preventing the grant of an injunction against the Crown was to be set aside. Applying this decision, the House of Lords granted the injunction, and the Act is now suspended.

The Protection of Freedom under Community Law

The great majority of Community decisions binding on us have been grossly illiberal. In 1989, for example, the Council of Ministers decided to ban the sale within the Community of any cigarette with a tar content of more than 15mg.²⁰¹ To come into effect from the end of 1992, this ban will prevent the sale of Senior Service, Capstan, Gold Flake and many other fine and historic brands. Again, the Germans are currently pressing for a Community law against Sunday trading more restrictive than any that has ever existed in English law, and that no British government could by itself hope to soften.²⁰² These are laws that should not be made nationally, let alone by the central institutions of the Community. They, and hundreds and thousands of others no less objectionable have done much to weaken the regard in which the Community ought to be held by liberals. But there have been a number of judgments handed down from the European Court significantly extending or preserving freedom.

²⁰⁰ *Regina v Secretary of State for Transport Ex Parte Factortame Ltd and others*, Case C-213/89, reported in *The Times*, 20th June 1990.

²⁰¹ *The Daily Telegraph*, 14th November 1989.

²⁰² *The Daily Telegraph*, 29th September 1990.

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According to section 42 of the Customs Consolidation Act 1876

[t]he goods enumerated and described in the following table of prohibitions and restrictions inward are hereby prohibited to be imported or brought into the United Kingdom, save as hereby excepted.

All that now remain in this table are

indecent or obscene prints, paintings, photographs, books, cards lithographic or other engravings, or any other indecent or obscene articles.

This section gives the Customs and Excise a wider power over what we may read or look at or use than the Police enjoy. The Police are obliged to proceed under the Obscene Publications Act 1959, and must convince a Jury that the article in question has a tendency to “deprave or corrupt”. The Customs and Excise need only persuade a Magistrate that it falls into the looser category of what is “indecent or obscene”. They are able, moreover, to prosecute anyone who deals with the article after its importation. In consequence, in many questions involving allegedly pornographic material, the authorities gave up seeking enforcement of the 1959 Act in favour of the 1876 Act.

In 1982, a company called Conegate tried to import into this country from West Germany a number of inflatable rubber dolls. These when inflated became life-size replicas of a woman’s body, complete with three orifices. They were seized by the Customs and Excise as “indecent or obscene articles”. The seizure was upheld in the condemnation proceedings before the Magistrates and on appeal to the Crown Court. But Conegate appealed next to the High Court, claiming that the seizure contravened Articles 30 and 36 of the Treaty of Rome. Article 36 allows the placing of restrictions on imports for the sake of preserving “public morality, public policy or public security”. It does not, however, allow restrictions to “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”. It was claimed that since there was no prohibition of the manufacture and sale of inflatable dolls in the United Kingdom, there ought to be none of their importation from elsewhere in the Community. To allow otherwise was to allow an “arbitrary discrimination or a disguised restriction on trade

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between Member States". The High Court referred the matter to the European Court, which found for Conegate.²⁰³

In itself an important case, this immediately had a wider effect than on the right to import aids to masturbation. Conegate had the money to mount a long and expensive appeal for its right to do business. But its victory established a principle that automatically governed all similar cases. In 1985, 37 customs officials entered into Gay's the Word, a small bookshop in Bloomsbury that imports literature by and about homosexuals. This entry - codenamed "Operation Tiger" - resulted in the seizure of books by Oscar Wilde, Gore Vidal and Christopher Isherwood among others. 70 of these books were selected for prosecution under the 1876 Act. It was beside the point that many of them had been openly on sale here for generations. All that mattered was that they had been imported and might therefore be eased into the category of the "obscene or indecent". The proprietors of the bookshop if found guilty faced sentences of up to two years in prison. The prosecution was dropped as soon as the Conegate decision was announced.

Our authorities have thus been restricted in their use of the 1876 Act. Formally, they need only liberalise imports from within the Community. But it would be impracticable to apply different tests to imports from different parts of the world. Even if they did, the American suppliers would simply reroute their goods through Holland or Germany. The Customs and Excise have duly been ordered to apply the more liberal test regardless of the exporting country. The European Court has done for the cause of liberty what no recent Parliament has shown the least inclination to do. Given a Bill of Rights to interpret and enforce, we are convinced that it would have both will and ability to do still more.

OBJECTIONS TO A EUROPEAN BILL OF RIGHTS

There are those who doubt this - who are firm liberals yet who also say that the notion of a European Bill of Rights cannot or ought not be realised. They offer two main objections.

²⁰³ *Conegate v Commissioners of Customs and Excise* (No 121/85) *Queen's Bench* (1987) 254.

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The Argument from Redundancy

First it is argued that a Bill of Rights can be drafted and passed into law only when there is no need of safeguards; and that, when needed, they turn out to be useless for stopping a government with strong public support. This is a neat dilemma. The American experience is cited in support. Chris R Tame argues that

[i]t was not the paper checks and balances of the American Constitution that maintained American Freedom. It was the invisible, but actually more real ones manifest in the ideas and actions of millions of Americans. The fact that people would rather go hungry than accept state welfare, that individuals simply would not put up with the sorts of interventionism now accepted as commonplace by contemporary Americans - this is the real power of ideas as social forces. It was the power of the social order, of civic society, and not scraps of paper that limited the American state.²⁰⁴

As soon as the American mood changed, he continues, not all the paper in the world could restrain the state. The Constitution was amended. What was not amended was interpreted away or turned on its head. The intention of the Founding Fathers was to entrench freedom behind legal defences that would endure for ages. It took less than 80 years for those defences to be sapped and the United States transformed into a “quasi-corporatist” superstate.

Even in those cases where the Constitutional safeguards appeared to work, it was usually only as a temporary break on the transformation. Robert Dahl has studied the 77 instances between 1803 and 1956 where the Supreme Court set aside Congressional laws as unconstitutional. In almost a third of these instances, the aims of the laws set aside were achieved by other means. In a fifth of these instances, the aims were achieved within four years. In only four were more than 20 years needed. “There is” he concludes, “...no case on record where a persistent lawmaking majority has not, sooner or later, achieved its purpose”.²⁰⁵

²⁰⁴ Tame, *op. cit.*, p. 21.

²⁰⁵ Robert A. Dahl, “Decision Making in a Democracy: the Supreme Court as a National Policymaker”, in B. Vanderhoef, *The Fiber of Democracy*, Harper and Row, San Francisco, 1970, p. 332 - quoted Tame, *op. cit.*, p. 24.

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But, in spite of its neatness, the dilemma is not entirely real. Governments are always in need of restraint, no matter who is in them or who elects them. It was not solely out of concern for the future that the first ten amendments to the American Constitution were adopted in 1791. It was also feared that the Federal Government would no sooner be settled than it would begin to encroach on the liberties of the people. As as early as 1803 - while many of the Founding Fathers were not merely alive but also politically active and even in control - the Supreme court asserted its inherent right of setting aside repugnant Congressional laws. Moreover, while Dahl's statistics are undeniable, the Court has still in more than two thirds of cases permanently restrained the executive; and in many of these it has enlarged or preserved American freedom. It has prevented prior restraint of the press, and narrowly defined the grounds on which anyone may be brought to account after publication. It has set aside Acts permitting official discrimination against unpopular political and racial groups. It has ensured the observance of due process in criminal prosecutions. Paper safeguards may lose much of their strength when the spirit from which they derived has vanished. But the Supreme Court and the documents that it is there to interpret cannot be described as redundant.

The Argument from Impracticality

Second, it is argued that no really effective Bill of Rights will be adopted by any government that habitually breaks the majority of its articles. We might just as well expect a thief to put himself into prison. The Government and public of the United States accept a Constitution and Bill of Rights that often stand annoyingly in their way. They accept them because they are there and have been there as long as the United States has existed. Offered fresh, unsurrounded by all the associations that now commend them, both might well be rejected. Our own government, whatever may be said at foreign gatherings, will never put itself voluntarily under restraint. As for the other governments of the Community, the nearest document to a Bill of Rights in which they have shown interest has been the dreadful European Charter - satisfying to a body of opinion, certainly, that wants the right to dole money and paid holidays and free television licences for the old, but hardly a new Magna Carta of freedom.

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This may be so. But Mrs Thatcher has made a serious and perhaps a long considered proposal. Whatever may be said about other politicians, she can be trusted. When she decides firmly enough that something ought to be done, she will do it, regardless of her short term popularity in the country or the opinions of her colleagues. In the late 1970s, she decided that inflation had to be brought down by a tight control of the money supply. The defeat of inflation was the greatest achievement of her first term - in spite of repeated advice to change course and the apparent collapse of the manufacturing sector. She defeated Galtieri. She defeated Scargill. She carried through the abolition of the metropolitan authorities. She carried through the reform of the rating system. If she decides that Europe - of which we are for the time being a part - is in need of a Bill of Rights, that is what she will set the British Government about pressing for.

While they have so far shown little enthusiasm for the notion, the other governments of the Community may have no objection to it in principle. Without exception, they are already restrained by written constitutions, and most of these contain an enumeration of fundamental rights. The present French Constitution, indeed, has in its preamble a complete recital of the famous *Déclaration des Droits de l'Homme et du Citoyen* of the 26th August 1789 - a flawed but still impressive statement of liberal ideals.²⁰⁶ Already used to restraint by their own courts, these governments may not greatly resist further restraint imposed by the European Court.

There is also the matter of our national pride to be considered. A Community Bill of Rights would restrain not only our own Government but also any central institution of the Community. This paper is written on the assumption that the Community will not become a Federation. Even so, there may remain central institutions with considerable legislative and administrative powers. The British public as a whole may not mind what intrusions are made by the British Government, and may therefore regard a domestic Bill of Rights with indifference or irritation. But it does mind what laws are made in Brussels, by foreigners. It will look favourably on any scheme to limit the power that French or German politicians can exercise in this country. It may at the same time - by a natural extension of the argument - be brought to an acceptance of restraints on our

²⁰⁶ This is not entrenched against express repeal. But it does contain a number of "general principles" that govern the interpretation of laws. It is also an object of almost general veneration.

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own politicians.

THE FORM OF A EUROPEAN BILL OF RIGHTS

All this being said, we now turn to the matter of how a Bill should be drafted - what plan its content and form should follow. Now, there is a good case for not drafting one at all, but instead for adopting one that already exists and is binding to some extent on all the countries of the Community plus nine others.

The European Convention on Human Rights

In 1951, mindful of what had been done by the National Socialists and of what was being done by the Soviet Socialists, the free nations of Europe came together to adopt a Convention on Human Rights. Drafted by the Senior Legal Adviser to the Home Office - Great Britain then for obvious reasons being seen as the one dry rock of liberty this side of the Atlantic - this was intended, unlike the Helsinki Declaration of 24 years later, to be an effective restraint on the subscribing governments. To ensure its observance, a European Court of Human Rights was established at Strasbourg.²⁰⁷ This Court has power to try cases brought by one government against another, and - save by Cypriots, Greeks, Turks and the Maltese - by private persons against their government. It has no power to hear cases at first instance, but an aggrieved party must have exhausted all domestic means of redress. If it finds for the Plaintiff, it can award damages and costs. Governments are obliged to comply with adverse judgments by appropriate changes to the law, compliance being supervised by a Committee of Foreign Ministers. The Convention lacks the binding force of the Treaty of Rome. Our Government is under no pressing obligation to give effect to the judgments of its Court. But those judgments have generally been given effect, if usually after some considerable delay²⁰⁸.

²⁰⁷ This Court is not to be confused with the European Court of Justice at Luxemburg. The two are quite separate. The former is part of the Council of Europe, the latter of the European Community. That the two abbreviate to European Court is an unfortunate coincidence.

²⁰⁸ The Whole Text of the Convention is printed in Ian Brownlie (ed.), *Basic Documents of International Law*, Oxford University Press, Oxford, 1983, pp.320-48.

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The Court has over the past 20 years, since it began hand down adverse judgments against the Government, had a decided liberalising effect on our law. Following judgments of the Court, governments have legislated - to stop the torture of terrorist suspects in Northern Ireland and to legalise homosexual acts there, to allow journalists access to documents read out in open court, to curb lawless surveillance by the Police and secret services, to enlarge the rights of prisoners, parents of children in care and the inmates of mental hospitals.

In most other countries of the Community, there is no need for the Convention to be invoked at Strasbourg, since it has been incorporated into their domestic law, and can be applied at first instance by their own courts. Such consensus as there is here on the need for a Bill of Rights is in favour of incorporating it into British law. In 1979, a Bill passed through the House of Lords to do this, but was rejected by the Commons on Government and Opposition insistence that nothing must restrain the executive. Another attempt was made by Lord Scarman in 1985. His Bill had the support of politicians from all the main parties, and of more than 20 organisations joined together in the Rights Campaign. The Front Benches were still too jealous of their actual or potential freedom even from moral restraint. His Bill failed. However, now that the Prime Minister has been converted to the notion of a European Bill of Rights, and that the most practical means of realising this is through the Community, this obstacle may have been raised. If the Convention were to be incorporated into the Treaty of Rome, it would automatically become part of British law. Also, it would be more effectively entrenched than if it were merely incorporated by Parliament.

The Convention has much to commend it. It exists. It applies already throughout the Community. It has been used to redress grievances. Its incorporation has wide support in this country. It is already incorporated throughout most of the Community. We should not be discontented if it were made the European Magna Carta. It would enlarge and preserve our freedom. It would allow the courts not only to review delegated legislation on procedural grounds, but also to review the enabling Acts themselves in the light of fundamental principles. It would keep Parliament from exceeding its proper authority.

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But, for all this, it is defective in its content. It is the product not of a liberal age but of the social democratic and soft authoritarian hegemony of the post War years. It does contain some definite protections. Take, as an example of this, Article 3.

Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- © to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.²⁰⁹

This does not cover all the rights of an accused person that have evolved in the Anglo-American tradition. There is no security against double jeopardy. There is no right to silence or against the compelling of self-incrimination. Also, it may go too far, in granting a right to free legal assistance. There are times when the resolution of a point of law is of public importance; and then it may be appropriate for the court to assign counsel for that point to be argued. But no one has a greater right under normal circumstances to a free lawyer than to a free doctor. If the Article requires a legal aid scheme to be run by the contracting governments, it is defective. Even so, it is on the whole a good Article. It states certain basic principles of procedural justice for the courts to apply in deciding the lawfulness of any prosecution.

Again, take Article 5:

²⁰⁹ The whole text of the Convention is printed in Ian Brownlie (ed.), *Basic Documents of International Law*, Oxford University Press, 1983, pp 320-348.

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Everyone has the right to liberty and security of person.

This would be better if it used the formula “life, liberty and property” - from the 14th Amendment to the American Constitution - than the vague “security of person”. But no other objection can be made from a liberal point of view. There are, however, six limitations on this. It continues:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug-addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

We say nothing against sections (a) to (d), or section (f). But section (e) is in part objectionable. There is no reason why alcoholics, drug-addicts or vagrants need to distinguished from any other class of persons. If an alcoholic breaks the law, by driving while drunk, or appearing drunk in a public place, or whatever, why not justify action against him by reference to the other sections?

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Equally, if a drug-addict breaks the law, by possessing an illegal substance, his offence is already covered by the other sections. The same applies with vagrants. There is no need to mention these classes of person separately from any other. Section (e) appears to allow action against members of them not for what they might have done but for what they are. This is undeniably bad.

But our most pointed objection has to do with Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It is very hard from reading this to see exactly what freedom is protected. No government may shut down opposition newspapers just to save itself in the polls. But it may rely on this Article to suppress opinion under virtually any other pretext. The “protection of... morals” might justify the shutting down of most of our national press. The “protection of the reputation or rights of others” obviously justifies the English law of defamation and copyright and so forth. But the clause is so vague that it might also justify the banning of arguments against the right of women to be ordained in the Church of England. It may well justify the recent French law, in which it was made an offence to deny that the German National Socialists murdered six million Jews. This is undoubtedly both a false and offensive denial. But falsehood and the giving of offence do not justify the suppression of opinion.

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An Alternative Draft Bill of Rights

In view of these defects, while the Convention is certainly better than nothing at all - and in spite of its defects may even be what we ought finally to advocate - we would offer the following alternative:

A BILL OF RIGHTS FOR THE EUROPEAN COMMUNITY

ARTICLE I

No person shall suffer punishment for breach of any law or other ordinance, whether made by the Community or National authorities, or any person or body exercising power delegated therefrom, that shall not:

- i apply to all other persons, without distinction of rank, sex, sexual orientation, religious persuasion or national or ethnic origin;

SAVE THAT this clause shall not prevent the making and enforcement by the National authorities of such laws as shall be required to protect the persons and traditional dignities of their Heads of State;

SAVE ALSO THAT this clause shall not prevent the making and enforcement by the Community or National Authorities of such laws in respect of aliens as shall be required for the defence of the Community or any of its member States or the preservation of public order therein;

- ii have been made and clearly published in advance;
- iii be enforceable by an independent court of law situated in the Country and district wherein the offence shall have been committed, and in which court the accused
 - a) shall have the right to a speedy and public trial,
 - b) shall have previously been informed (in a language known to him or her) of the nature and cause of the accusation,
 - c) shall be presumed innocent until found guilty,
 - d) shall be confronted by the witnesses for the prosecution,
 - e) shall have compulsory process for obtaining witnesses for the defence, and
 - f) shall have the right of assistance by counsel in all points of law and of fact.

ARTICLE II

No law or other ordinance shall be made, whether by the Community or National authorities, or

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by any person or body exercising power delegated therefrom, prohibiting the free exercise of religion, or abridging the freedom of speech or of the press, save as shall be required

- i for the protection of rights determinable under the laws of torts, of contract, of intellectual property and of confidence;
- ii for the preservation of public order in the light of a clear and present danger;
- iii for the effective conduct of legal proceedings;
- iv for the preservation of official secrecy, it being for the prosecuting authority in any proceedings sanctioned by this Clause to show (where necessary in camera) why the matter in dispute ought not to be revealed, and stating on oath or affirmation the nature and extent of the harm to be expected from revelation.

ARTICLE III

No person shall be subject for the same offence to be twice put in jeopardy of life or liberty or property; nor shall the accused of any offence be compelled to give evidence for the prosecution.

ARTICLE IV

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE V

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE VI

No person, having been arrested, shall be detained for an unreasonable length of time before the laying of charges; nor shall any person, while in custody, be denied access to legal advice, or be subjected to cruel or degrading treatment.

ARTICLE VII

No private property shall be taken for public use except on payment of its open market value, such value to be determined in the event of dispute between the parties by an independent valuer mutually agreed, or, in default of agreement, by a valuer to be appointed by a court of law on application.

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ARTICLE VIII

The citizens of each Member State of the Community shall have the right to visit, settle and follow any lawful occupation within the other Member States of the Community; nor shall there be any restrictions on the movement of money within the Community or on the movement of such goods as may lawfully be manufactured or traded within any one Member State of the Community into any of the other Member States of the Community.

ARTICLE IX

All of the rights recognised in this Bill of Rights shall belong to the citizens of each Member State of the Community, together with such aliens as are for any reason within that Member State (subject only to the Second Proviso to Article I,i hereinabove), without distinction of rank, sex, sexual orientation, religious persuasion or national or ethnic origin.

ARTICLE X

All of the rights recognised by the laws of each Member State of the Community shall belong to all of the citizens of that member State and of all such citizens of the other Member States as are for any reason within that Member State, together with all such aliens as are for any reason within that Member State (subject only to the Second Proviso to Article I,i hereinabove), without distinction of rank, sex, sexual orientation, religious persuasion or national or ethnic origin.

ARTICLE XI

Any person whose rights recognised in this Bill of Rights shall have been violated shall in all cases have an effective remedy on application to the courts of the Member States or to the European Court of Justice.

A BRIEF COMMENTARY

Article One

This Article attempts a fuller statement of the rule of law than was given earlier in this paper. While much of it needs no commentary, there are parts of it that may be open to question

Non-Discrimination

Clause i looks like part of a recruitment advertisement for one of the more disreputable local

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authorities. But it seeks to impose no obligation on any employer to be more tolerant than he wishes. It gives no one the right to a job or or house or university place or any benefit. It seeks simply to close an obvious loophole in the rule of law.

For F.A. Hayek, freedom and the rule of law are very nearly synonymous concepts. He defines freedom as “independence of the arbitrary will of another”.²¹⁰ He contends that “when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free”.²¹¹ He adds that, apart from this requirement - that every law should be universal and intended for application to an unknown number of future cases - there is no need for a Bill of Rights.²¹²

Hayek is right in so far as the rule of law is a necessary condition for freedom to exist for any length of time. But when he appears to regard it as a sufficient condition, he overstates his argument. Where there is no rule of law, there is generally no freedom. It is untrue that freedom is always a consequence of the rule of law. If it were enacted that every adult person on reaching the age of 65 should be put immediately to death, it would be hard to find a less liberal law. But, so long as it applied equally to all within the jurisdiction, and were made and enforced according to the correct procedure, it would be fully in conformity with the rule of law. It is, of course, extremely unlikely that any legislature would make such a law, knowing that its provisions would apply to the individual legislators as well as to the ordinary population. However, there are general laws that would bind those making them, but only hurt others. Hayek does accept this objection, but gives it less attention than it deserves. He says that

[i]t is not to be denied that even general, abstract rules, equally applicable to all, may possibly constitute severe restrictions on liberty. But when we reflect on it, we see how very unlikely this is. The chief safeguard is that the rules must apply to those who lay them down and to those who apply them - that is, to the

²¹⁰ F.A. Hayek, *The Constitution of Liberty*, Routledge and Kegan Paul, London, 1960, p. 12.

²¹¹ *Ibid*, p. 153.

²¹² See Volume 3 of his *Law, Legislation and Liberty*, Routledge and Kegan Paul, London, 1982, p. 109.

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government as well as the governed - and that nobody has the power to grant exceptions. If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such exception follows from another general rule) and if even authority has no special powers except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited. It is possible that a fanatical religious group will impose upon the rest restrictions which its members will be pleased to observe but which will be obstacles for others in the pursuit of important aims. But if it is true that religion has often provided the pretext for the establishing of rules felt to be extremely oppressive and that religious liberty is therefore regarded as very important for freedom, it is also significant that religious beliefs seem to be almost the only ground on which general rules seriously restrictive of liberty have even been universally enforced. But how comparatively innocuous, even if irksome, are most such restrictions imposed on literally everybody, as for instance the Scottish Sabbath, compared with those that are likely to be imposed only on some!²¹³

Now, this is not so. In the first place, religion is not the only ground on which general restrictions affecting only a minority have been placed. In the second, religious restrictions in themselves are often productive of more pain and disorder than the fairly trifling matter of sabbatarianism.

About a fifth of the Bulgarian population is Moslem. More than three quarters of Albanians are Moslems. Both of these countries will sooner or later be admitted to the Community. In each of them, the dominant religion has been and largely remains subject to persecution from an atheist state. Once the persecutions are lifted, and the majority has a say in government, there is likely to be an assertion of religious values. Public worship will again be legal. Religious property will be restored and buildings reconsecrated. There is nothing wrong in this. But the assertion may easily go further. The persecution of all religion may be replaced by the persecution of minority religions. A Bill of Rights containing only what Hayek recommends would not prevent an extremely bitter persecution in these countries.

Imagine a Bulgarian law that read as follows:

Any child or person who in any public place and on any occasion shall appear with covered head commits an offence, and on conviction therefor shall be liable

²¹³ Hayek (1960), pp 154-5.

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to a term of imprisonment not exceeding three years or unlimited fine or both.

In any circumstance, this would be a monstrous law. It requires what no government has any business to require. It imposes an extremely high penalty for non-compliance. But it could easily be obeyed by Christians and atheists, though they might find compliance a nuisance in cold or very sunny weather. But, for Moslem women, as we all by now should know, it would mean a choice between apostasy and house imprisonment. It would prevent the education of girls from devout households. It would, while staying formally within Hayek's category of permissible legislation, impose a religious discrimination leading insensibly to a lowering of social and economic status.

Many demands of the gay movement are variously to be deplored or laughed at. Homosexuals are not to have laws against making fun of them. They are not to be given privileges under housing or employment law. But some of their demands are perfectly just. They labour at present under a vast mass of discriminatory legislation. Except in Denmark, they cannot marry. In England, Scotland and Ireland, even private contracts amounting to marriage are unenforceable. Except in Denmark and Holland, they cannot inherit in the event of a partner's intestacy. Their disabilities under the civil law will be treated in Article X. For the moment, we deal only with the disabilities of male homosexuals - lesbian acts never having been criminal in any of the member states - under the criminal law. They cannot make love with the same freedom as heterosexuals. In the Irish Republic, they are absolutely forbidden by law to make love. In this

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country, as in Germany and Luxemburg, their age of consent is different.²¹⁴ Each of these burdens is drafted so as to apply to the whole population. Julian Clary cannot sleep with a man in an English hotel bedroom. Neither can the Editor of *The Sun*. There is no formal discrimination.²¹⁵

For these reasons, it needs to be made explicit that when a law is required to apply to everyone without distinction, the way is not left open to informal persecution of an unpopular minority. But this, it must be emphasised, is all that is intended. There are inevitably laws that can by a little sophistry be claimed to discriminate against a certain group. The criminal statistics might, for example, show that Catholics are more likely to declare fraudulent bankruptcies than are Protestants. But no reasonable person would infer from this that the British Insolvency Act 1986 is the modern successor to the Acts of Supremacy and Uniformity. The accidental tendency of a law might be to discriminate. But anyone who would have it set aside must show that its purpose is to discriminate.

²¹⁴ Ages of Homosexual Consent throughout the Community

Country	Heterosexual	Homosexual	Year of legalisation
Belgium	16	16	1792
Denmark	15	15	1930
Germany	14	18	1969*
Greece	15	15	na
Spain	12	12	1822
France	15	15	1791
Ireland	16	---	---
Italy	14	14	1889
Luxemburg	14	18	1792
Holland	16	16	1811
Portugal	16	16	1852
UK	16	21	1967

(Source: Peter Tatchell, *Out in Europe, A Guide to Lesbian and Gay Rights in 30 European Countries*, Channel Four Books, 1990)

* In East Germany, the age of consent was equalised at 14 in 1968. We do not currently know whether this law has been retained or whether Federal law now obtains throughout the new States.

²¹⁵ Hayek himself gives a further example: "A good illustration from another field of how a non- discrimination rule can be evaded by provisions formulated in general terms... is the German customs tariff of 1902.... which, to avoid a most-favoured-nations obligation, provided a special rate of duty for 'brown or dappled cows reared at a level of at least 300 metres above the sea and passing at least one month in every summer at a height of at least 800 metres'" (*ibid*, note 20 in Chapter Fourteen, given p. 489.

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Protection of Heads of State

It is often said that an age as enlightened as our own has no need of monarchy or monarchical privilege. What is it, people ask, about “a shot of murky water” that singles anyone out for power and veneration? The answer to this is simple. There is nothing that cannot be made to look absurd or worthless by the right choice of descriptive language. We can describe sexual intercourse as the rubbing together of two small areas of flesh. We can describe the gold standard as the digging of yellow metal out of the ground only to bury it again in a bank vault. We can describe a Bach *Partita* as a collection of sounds made by a man dragging a hundred horse hairs over half a dozen lengths of animal gut. These can all be very witty sayings. But they have no other use. The value of monarchy lies not in how it might appear to some droll visitor from Mars, but in how it appears to those living under it.

Ours is not a particularly enlightened age. It is certainly not an age of republicanism. Constitutions and country names may state otherwise, but the greater part of mankind is subject to what the Greeks called *monarchia*, or the rule of one man. Saddam Hussain, Colonel Gaddafi, Michael Gorbachev, Kim Il Sung, Robert Mugabe - each is called a President. Each has more in common with a Roman Emperor of the third century than with an American President. Each may also be a tyrant. But tyranny is only the corruption of monarchy, not its antithesis. True republicanism is very rarely to be found. Where it is to be found, the Head of State is surrounded by strict legal and conventional safeguards. Only in the United States have these safeguards been effective for any significant length of time. Everywhere else, they have been periodically broken through.

The British monarchy is one of the strangest institutions known to us. It is one of the strangest and most beneficial. It could never have been consciously designed. Once lost, it could never be recreated. Because of it, we have during the past three centuries enjoyed both representative government and political stability. On the one hand, the Queen can in normal circumstances do nothing but what her Ministers advise. On the other, she fills a position that is closed to any rival. She is head of state not by right of popular election or military force, but by prescription. In this

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country, a question is firmly settled that in most others remains actually or potentially open.

The monarchy has not prevented us from losing many of our freedoms. But it has saved us from what is equally bad - the ultimate ambition of the corrupt general or politician. The Queen is both privileged and disabled in law. She pays no taxes. She cannot in her personal capacity be taken before the courts. To kill her is more than murder. To attempt her life is more than conspiracy to murder. She cannot change her religion. Her choice of marriage partner is circumscribed by law and convention. But, in so far as they define and protect her title, the continued existence of these privileges and disabilities is in our interest. They must be exempted from the general requirement of equality before the law.

Much the same is to be said concerning the monarchies of Spain, Holland, and Belgium, and the Grand Duke of Luxemburg. To a much lesser extent, the same may be said concerning the various Presidencies of the other countries of the Community.

The Separate Legal Status of Aliens

So far as possible, aliens residing or travelling within the Community are to enjoy the same protection from this Bill of Rights as the citizens of each member state. But it will inevitably be necessary from time to time to impose restrictions on the citizens of certain foreign states which are at war with some or all of the member states of the Community or with which relations are for some other reason strained. It is to be hoped that these occasions will be very few. But they must be anticipated.

The Ban on Retrospective Legislation

Retrospective legislation has been called a sure sign of tyranny. It robs the law of certainty. It requires the prudent not only to find out what the law is and to obey it, but to do whatever the government seems to want on the assumption that it will eventually be expressed in a law. It is both shameful and alarming that the British Government has made retrospective laws.

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The Firearms (Amendment) Act 1988 was passed to restrict the ownership of pump-action shotguns and semi-automatic rifles. Under section 21, the Home Secretary was empowered to make a scheme of compensation for those surrendering their newly prohibited weapons. Under the scheme eventually made, there was to be a flat payment of £150 per gun, or a payment of 50 per cent of its average retail price during the summer of 1987. This was an act of confiscation, and would as such be forbidden under Article VII of this Bill. But Sections 21 (a) and (b) provide for compensation only to those owners who lawfully purchased their guns before the 23rd of September 1987. The Act became law in the Summer of 1988. Section 21 was brought into force on the 30th of April 1989. No one who bought one of the restricted firearms during the preceding year and a half was breaking the law. Yet he was punished as if he had. He was fined by a denial of compensation for not having consulted the mere wishes of the Government before doing what was at the time perfectly lawful.

Article I, 9:3 of the American Constitution expressly forbids the making of laws ex post facto. Our own unwritten Constitution evidently does not forbid them. This Clause would supply the deficiency.

The Requirement of Due Process of Law

The wording of Article I,iii is taken mostly from the Fifth and Sixth Amendments to the American Constitution and partly from the European Convention. It should be neither controversial nor in need of any elucidation.

Article II

The right of free speech may well in particular instances seem both vexatious and dangerous. It is, even so, the most important of all our liberties. Take this one away, or seriously abridge it, and every one of our others is immediately threatened. The wording of this Article follows the First Amendment to the American Constitution, which reads as follows:

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This is far better than Article 10 of the European Convention. It states that the right shall not be abridged, not that it may in an indefinitely large number of circumstances. But where the Convention goes too far in one direction, this goes too far in the other. There can be no absolute right to freedom of speech. Congress and the Supreme Court have always accepted this. The First Amendment does not prevent the bringing of actions for defamation, or breach of copyright, for reasons of essential state security, or any number of other reasons. It has always been read as a restraint on the censorship of comment on matters of legitimate public concern. Therefore, while the wording of our second Article broadly follows that of the American First Amendment, the exceptions are clearly stated.

The Law of Torts

Libel

It has been said that a person's reputation is nothing more than an idea existing in the minds of others, and that no one can legitimately expect to have a property right in the contents of another's mind. It is, however, true that people do consider themselves to have such a right - and that, if the law denied them any redress, they might be inclined to seek it themselves, in duels or in other acts of violence. In addition, the right is capable of clear statement and application: "[t]he law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit".²¹⁶

²¹⁶ Per Mr Justice Cave *J Scott v Sampson* (1882) 8 *Queen's Bench Division* 503; quoted in *Gatley on Libel and Slander* (1981 ed.), London, Sweet & Maxwell, para. 1.

1. *Chlorophyll a* (Chl *a*)

Trial	Control	MCI	AD
1	85	75	65
2	88	78	68
3	90	80	70
4	92	82	72
5	95	85	75

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Injurious falsehood

Here, it is required that actual financial damage must be proved, as opposed to the less tangible loss of reputation involved in libel. If A were to publish a claim that Captain Flint's last treasure were buried under B's back lawn, and a mob came and turned B's garden into something resembling a shell crater, he would have an obvious cause of action against A.

Breach of Contract

If someone contracts not to publish a book until after a certain time, or agrees to any other limitation, it would be monstrous if he were able to avoid performance by invoking an abstract right to freedom of speech. Accordingly, there is no such protection under English or any European law; and there is none recognised in this Article.

Copyright

Unlike throughout most past ages, it is currently believed that certain arrangements of words or sounds or other common elements constitute distinct and potentially valuable works of the mind which deserve the same protection as more tangible forms of property. No one has the right to use what he has not lawfully acquired. He cannot profit from the sale of another's stolen property. He cannot, without permission, publish what he has not himself written or obtained the right to publish.

The Law of Confidence

"The law has long recognised that an obligation of confidence can arise out of particular relationships. Examples are the relationship of doctor and patient, priest and penitent, solicitor and client, banker and customer. The obligation may be imposed by an express or implied term in a contract but it may also exist independently of any contract on the basis of an independent

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equitable principle of confidence".²¹⁷ This obligation clearly binds the person to whom information has been imparted. It also binds any third person to whom it might be passed. Anyone who publishes such information, unless it can be shown already to exist in the public domain, or that it is of a nature so iniquitous that its disclosure becomes a duty, is rightly liable to civil remedies.

Public Order

We turn now to the laws of sedition, blasphemy, obscenity, incitement to racial hatred, and all those others that are currently justified at least in part on the grounds of keeping the public order. None of these is a matter affecting any specific individual. In each case, a prosecution must be undertaken either by the state or by a private person who needs prove no more injury to himself than is alleged against the public as a whole. The argument, that certain kinds of writing have a tendency to deprave or corrupt the reader, may or may not be correct. What we deny is the normal conclusion to this argument, that the circulation of such writings should be forbidden. People are adults or they are children. If they are the former, they are to be treated as rational beings, capable of interposing some process of thought between suggestion of evil and acceptance of it, and then between acceptance of evil and action in obedience to its promptings. Otherwise, if they cannot be trusted with temptation, it seems rather strange to trust them with the vote. If they cannot govern themselves, they most certainly ought not have the right to govern everyone else.

There are, however, circumstances in which the publication of certain views - or perhaps their publication in certain forms - might provoke a breach of the peace. It seems at present very likely, for instance, that the appearance in a Bradford or Parisian newspaper of a cartoon showing the Prophet Mahommed, or the late Ruholla Khomeini, fornicating with a pig would lead to wild rioting. In the case of this rather extreme instance, it can be argued that the publisher of the cartoon ought to be answerable at law. True, the existence of a law before which he might be answerable would encourage many of the commotions which it was designed to prevent: if

²¹⁷ Per headnote in *A.G. v Guardian Newspapers* (No. 2) (HL(E)) 3 *Weekly Law Reports* [1988] 777 (the "Spycatcher" judgment).

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throwing petrol bombs really could produce the withdrawal of offending material, it would be only reasonable for some people to throw them. But public order must be kept. Laws must be made and enforced against disturbances. It would be foolish to prevent such laws or rob them of their effectiveness. The only proper limitation on the various governments of the Community ought to be on the grounds of proximity of danger. It should be for the courts to decide whether any particular statute or action was required “in the light of a clear and present danger”.

Contempt of Court

If trial by jury is to be retained or introduced in any part of the Community, it follows that the press should be restrained from seeking to influence potential jurors with sensational, and perhaps incorrect, accounts of the evidence to be offered in pending criminal proceedings. To this extent, the law of contempt of court is justified. It is needed to secure justice for individuals accused of having broken the law. But most civil proceedings within the Community either are not or never have been tried before a jury. Even in England and the Irish Republic, interlocutory proceedings and appeals always have been decided by judges. That a judge cannot disregard irrelevant or biased press comment in his deciding an issue ought to be incredible. The present English law, contained in the Contempt of Court Act 1981 appears to have gone too far. It allows the deferral, or even outright prevention, of discussions that often involve matters of great and pressing importance.

Official Secrecy

While the state exists, it will continue to have secrets in need of protection. At present, there are many things that ought not to be made public. For example, a newspaper editor might take it into his mind to discover and publish the names and addresses of informers against the various Northern Irish terrorist groups. The consequences of this are so easily predictable, that to do it would be almost to commit murder. The civil damages payable in any action for breach of confidence would be grossly inappropriate. For this reason, then, some law of official secrecy has a proper function.

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But this is not to endorse any law so wide as the British Official Secrets Act 1911, now repealed, or its present successor, which remains largely a means of protecting governments from public ridicule or execration. It must in each prosecution be made clear to the court what must be protected and why. It must be for the courts to decide what ought to remain secret, not a government minister.

Article III

The wording of Article III is derived from the Fifth Amendment to the American Constitution, and supplies a deficiency already noted in the wording of the European Convention. Its purpose is to confer a procedural right not generally recognised in most Community countries, and to preserve one currently under attack in our own country.

Under section 1 of the Criminal Justice Act 1987, the Serious Fraud Office was set up. Section 2 allows this body to require a person under investigation for serious or complex fraud, or any person who is reasonably thought to have information relevant to such a fraud, to attend before it and answer questions or furnish other information. Anyone who fails to comply commits an offence. Though statements made under compulsion can be used only to contradict other statements made later by the defence in court, documents surrendered can be used by the prosecution for such purposes as it may think fit. The writers of the standard commentary on this Act are driven to say: "Thus significant inroads are made on the privilege against self-incrimination and the maxim that 'no one shall be required to be his own betrayer'".²¹⁸

Article IV

The wording of Article IV is copied directly from the Eighth Amendment to the American Constitution, which is copied in turn from our own Bill of Rights of 1689. Its function is to prevent any clever manipulation of the law into a weapon of persecution. Just such a

²¹⁸ Emmins and Scanlan, *The Criminal Justice Act 1988*, Sweet and Maxwell, London, 1988, p. 6.

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manipulation was made by the English Judges following the accession of James II in 1685. While still Duke of York, James had begun civil proceedings for defamatory words against the unspeakable Titus Oates; and the Jury had awarded the fabulous sum of £100,000 - in our own debased currency about £8 million. Unable to pay, he was committed to prison for debt. As soon as the new reign began, he was unlawfully put in chains. He was then brought to trial for several perjuries, or which he was notoriously guilty. He was convicted. Now, while he had perjured several lives away, his crime in English law ranked only as a misdemeanour. He was liable to be burned on the hand and fined. But he was sentenced to be stripped of his clerical habit, to be pilloried, and to be whipped from Aldgate to Newgate then back again. If he survived this, he was to be imprisoned for life and pilloried five times every year in various places about London.

It was to prevent abuses of this kind that Parliament in the next reign first enacted the Clause. The American colonists retained it. We do likewise.

Article V

Except for the dropping of a few capital letters, the wording of Article V is copied directly from the Fourth Amendment to the American Constitution. It is a codification of the English common law as stated in the various cases connected with John Wilkes. In the most famous of these, *Entick*, a printer, had sued two officials for having broken into his house and seized his papers. They pleaded in defence a warrant signed by one of the Secretaries of State. The warrant was extremely vague and appeared to sanction what is called a “fishing expedition”: The Government wanted to prosecute *Entick*, but first had to find enough evidence to support a prosecution. Passing judgment, Lord Chief Justice Camden of the Common Pleas declared the warrant unlawful, in that it was permitted neither by the common law nor by statute.²¹⁹ For the next 170 years, general searches and seizures were to remain illegal in this country.

But, since their first statutory authorisation, in the Public Order Act 1936, they have become

²¹⁹ *Entick v Carrington*, (1765) 19 *State Trials* 1030.

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increasingly common and accepted. The current law is stated in section 19 of the Police and Criminal Evidence Act 1984:

- (1) The Powers conferred by subsections (2), (3) and (4) below are exercisable by a Constable who is on any premises.
- (2) The Constable may seize anything which is on the premises if he has reasonable grounds for believing -
 - (a) that it has been obtained in consequence of the commission of an offence; and
 - (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed....
- (3) *The Constable may seize anything which is on the premises* if he has reasonable grounds for believing -
 - (a) that it is evidence in relation to an offence which he is investigating, or any other offence; and
 - (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed....
- (5) the powers conferred by this section are in addition to any powers otherwise conferred.

The whole section justifies seizure without warrant. The italicised clause justifies the seizure of material not specified in any warrant even if one is taken out. French and German law is no more restrictive in this sense than our own. If people really are to be secure in their persons and properties, they must have a proper written safeguard such as our Article V.

Article VI

The only member state of the Community particularly lax in respect of Article VI is Greece. This, of course, is reason enough for its inclusion. It will also be needed for the Eastern countries, which, despite the best will in the world, will have police forces trained under the Old Regime. People are not to be held uncharged in custody without proper cause. Nor are they to be tortured. Nothing further ought to be said on this matter. A European Bill of Rights is not the place for elaborating a code of procedure. Each legal system in the Community has its own notion of what

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is an unreasonable length of detention. It will be for the European Court to decide whether each of these notions is generally acceptable.

Article VII

It is to be regretted that every member state of the Community has a law of compulsory purchase; and that none is likely in the foreseeable future to put an end to it. But this must be accepted. Rather than try abolishing a power that will be fiercely defended, it seems much better to regulate it.

Article VIII

The Community is to be a free trade area. Already, the Continental member states are removing all the fences and other controls at their mutual borders. The French and Italian border is now marked by nothing more physically impeding than the brass meridian strip at Greenwich. The clear intention is the removal of all other impediments. Article VIII confirms this, condensing the relevant Articles of the Treaty of Rome. It is to be noticed here that whatever may lawfully be made or sold in any one of the member states of the Community must be accepted into all the other member states. The purpose of this is to standardise the laws of the Community in line with those of the most liberal member state.

Articles IX and X

Articles IX and X simply close any loophole not closed by Article I,i. Every person in the Community is so far as possible to be equal before the law.

Article XI

The purpose of Article XI is make it explicit that the Community law of which this Bill of Rights is proposed to be a part shall apply throughout every member state of the Community. As has

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already been explained, it does apply in this country, and the means are in place by which it may be invoked. An aggrieved person applies to the Queen's Bench Division of the High Court of Justice for a judicial review of executive action, citing the relevant Community law. At present, except where injunctions against the Crown are concerned, the matter is referred to the European Court in Luxemburg for a preliminary ruling. With each ruling, however, the need for future referrals diminishes; and the day will come when the whole body of Community law is routinely applied in our own courts. But it would help if the need for any future referrals - since they are immensely expensive - could be eliminated. It would help also if the new member states to be admitted from the East were to have the obligation clearly imposed on them to make every remedy contained in Community law immediately available to their subjects.

CONCLUSION

It should not be supposed that the adoption of this draft Bill of Rights or any other would produce an absolute equality of rights throughout the Community. It would not. The two kinds of legal system established in the member states differ not only in their incidentals but also in some of their essentials. In England, Scotland and the two Irelands, the common law is established. Throughout the rest of the Community, the Napoleonic Code is either established or followed more or less closely. The common law permits the granting of injunctions and civil imprisonment. Continental law does not. Continental law makes an absolute distinction between public and private law. The common law, for all its recent development of judicial review, remains a unified system that makes a dwindling number of distinctions between private persons and the public authorities. One practical effect of this difference is that while in the common law countries, every official must act within the law under pain of personal liability, in the code countries officials may do largely as they please, subject only to an obligation on the state to make compensation. It has already been said that the notion of what is reasonable will differ among the various member states. It is highly likely - if to a smaller extent than now - that what is legal in Germany will remain illegal in Great Britain and *vice versa*. The only means by which uniformity could be ensured would be to destroy each national system of law and impose a common model in its place. This neither will nor ought to be done.

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In spite of this, the opportunity is presently before us to make a new Europe, of unrivalled freedom and prosperity, in which the old hatreds will have truly vanished, in which the unique potential of our common civilisation will be fully realised. We have only to follow where Margaret Thatcher has led.

Chapter Eleven

The Right To Smoke: A Christian View by Sean Gabb 15,515 words

**First published by the
Freedom Organisation for the Right
to Enjoy Smoking Tobacco (FOREST),
London, 1989,
ISBN: 1 871833 05 1**

If the trumpet give an uncertain sound, who shall prepare himself to the battle?
(1 Cor., 14:8)

Introduction

I do not wish to deny that there are health hazards associated with smoking - just as there are health hazards associated with virtually all activities people find pleasurable, from drinking to jogging.

Around two fifths of the adult British population do smoke. This has been a declining fraction of the whole during the past thirty five years, or ever since the first hard evidence of the likely risks to health were published. In 1970, 128 million cigarettes were smoked here. By 1984, this figure had fallen by 22 per cent, to 99 million.²²⁰ 99 million cigarettes, even so is still enough

²²⁰ M. A. Plant, *Drugs in Perspective*, Hodder and Stoughton, London, 1987, p. 66.

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laid end to end to stretch between New York and Babylon. Two fifths of the adult population is still around 18 million people.

Not surprisingly, then, smoking and tobacco are a public issue of considerable importance. Its importance has grown in recent years with each new revelation of the dangers involved. Some part of this, to be sure, has to do with the possibility that non-smokers might be at risk from inhaling the allegedly carcinogenic fumes of others' cigarettes. But, in the absence of anything approaching definite proof, talk of 'passive smoking' must be thought for the moment of secondary value. Easily the largest part of the issue concerns the degree to which smokers should be allowed to harm themselves. What debate, therefore, is currently taking place may be seen as a specific skirmish in a more general struggle. This struggle is between the advocates of authority and the advocates of freedom. On the one side, there are the British Medical Association, representing the doctors, and the small pressure group, Action on Smoking and Health, representing itself. These want, if not the outright prohibition of tobacco, then certainly very severe restrictions on its consumption. This involves, at the least, tight controls on the advertising of tobacco products, and progressively heavier taxation of them. Their propaganda ranges from the solidly factual to the absurd. Sometimes pictures are handed round, showing the effect of tar on the average pair of lungs. Occasionally, someone like the anti-smoking expert, M. A. H. Russell, goes about proclaiming such arrant nonsense as that "[o]nly about 15 per cent of those who have more than one cigarette avoid becoming regular smokers."²²¹ On the other side is an as yet loose coalition of committed smokers and libertarians. The interest of these first is evident. They enjoy their habit, and resent any threat to their right to go on doing so. The members of the second may or may not themselves enjoy smoking. What moves them is a passionate belief that no one should be forced to do what others regard as in his or her best interest. Following John Stuart Mill, they assert that "[o]ver himself, over his own body and mind, the individual is sovereign."²²²

²²¹ M. A. H. Russell in 1971, quoted in Heather Ashton and Rob Stepney. *Smoking: Psychology and Pharmacology*, Tavistock Publications, London, 1983, p. 140.

²²² John Stuart Mill, *On Liberty*, 'Everyman' Edition, J. M. Dent & Sons Ltd., London, 1977, p. 73.

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As yet, the political parties are largely unaligned in the debate. True, the Labour Party inclines to the anti-smoking lobby. It is on record as having proposed bans on cigarette advertising save at the point of sale,²²³ and on the placing of cigarette vending machines.²²⁴ But the Conservatives cannot be regarded as inclining to the other side. It was Sir George Young, then a junior health minister in the first Thatcher Government who said in 1980 that “[t]he traditional role of politicians has been to prevent an individual causing harm to another, but to allow him to do harm to himself. However, as modern society has made us all more interdependent, this attitude is now changing.”²²⁵ Young was moved elsewhere very shortly after. But the Government still spends about 3.5 million per year on anti-smoking campaigns. It still pressures the tobacco companies into further ‘voluntary’ restrictions on their advertising and promotion. My own suspicion is that its continuing tolerance of the industry owes less to the ideas of J. S. Mill than to the £5,000 million or thereabouts raised each year from taxes on tobacco products.

This is, however, beside my current point. What I propose here to discuss is whether there can be any specifically Christian view of the matters raised above. There are Christians who also have decided views on smoking. A couple of years ago, for example, what the newspapers described as “two hundred church and community groups” joined in calling on the Government for a significant increase in tobacco duties.²²⁶ Again, it would be incredible if, of the eighteen million Britons who smoke, none was additionally a devout churchgoer. But, in both these cases - and especially in the former, judging from its context - the taking of sides in the argument has not been connected with any fundamental point of theology. Rather, it has been an instance of what Edward Norman calls the “politicization” of religion.²²⁷ It shows the adoption by churchmen of whatever political ideology may currently be the general fashion, and its being

²²³ *The Times*, London 3rd April 1986.

²²⁴ *The Times*, London, 12th July 1986.

²²⁵ Quoted in Ashton and Stepney, *op. cit.*, p. 144.

²²⁶ *The Times*, London. 27th January 1986.

²²⁷ Edward Norman, *Christianity and the World Order* (being the BBC Reith Lectures for 1978). Oxford University Press, 1979, p. 2. I do not, in this essay, adopt Dr Norman's position, which is that there is no political ideology inherent in the doctrines of Christianity. But I do admire the force and clarity with which he exposes the pretensions of today's political clerics.

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given a religious gloss subsequently. Arguments purely over the extent of individual harm or the nature of individual rights in society are secular matters. They can have no validity to a Christian, deliberating as such, unless they can be first connected with some precept of the Divine Law. Before any answer can be attempted, our proper objects of enquiry must be stated. These are: whether smoking tobacco is contrary to this Law, and, if so, whether there is any implied right or obligation to use the coercive power of the State against smokers. Since these are largely subsumed in the wider question, of what scheme of human politics is most compatible with the Divine Law, this also ought to be examined. But first to be discussed is smoking as a matter in isolation. With this I shall begin - though not until I have dealt with a number of preliminary issues which I feel it my duty not to avoid. For, addressing myself as I am to an audience which is, at least in part, hostile or indifferent to Christianity, I must first answer the inevitable question in reply to my own - of whether it matters what God is supposed to think about smoking; or, more generally, of what religion has, in the modern world, to do with politics and morality. Many atheists do ask this, and seem to think it a clever question. It has two answers.

I Religion, Politics and Morality

The first is simple and obvious. Sacred and secular matters always have been connected in the popular mind, and probably always will be. And, sad though perhaps it is to mention, the history of Christianity has been, to an extent uncommon even with religion, a history of persecution. Its first legal recognition came in the year 313, with the Edict of Constantine. This was a grant of toleration, on a basis of complete equality with every other faith in the Roman Empire. It was not enough. The Christians were a minority, but they had the Imperial family as converts. Their bishops were both able and eager to influence the direction of State policy in religious affairs. Eighty three years later came the Edict of Theodosius, suppressing the Pagan ceremonies. The performance of rites which had come down in unbroken sequence since before the time of Homer, and which formed the agreed basis of classical civilisation, was made a capital offence: and the laws were rigorously enforced. It was not until the year 529 that the Athenian schools of philosophy were closed by the Emperor Justinian. But Paganism by then had been effectively

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dead for generations. Its wiping out remains a very impressive achievement.

Then there were the heretics - or those rival Christians who in any doctrinal argument had the weakest force of arms. Few people seem greatly worried today whether Christ is *homoousios* or *homoiousios*; whether his substance is identical to that of the Father, or merely similar to it. Those Christians in the fourth century who spoke only Latin were somewhat perplexed, since the two Greek words both translated as *consubstantialis*. But, in the eastern half of the Empire, it was a question of the highest importance. Street mobs fought pitched battles over its correct resolution. Bishops kicked each other to death. So far from its eventual subsiding, further questions came to depend on it. If Christ were *homoousios*, had he two natures, or one, or two and one? If he had the two and one, might he still have only one directing will? The Arian and Monophysite and Monothelite controversies together continued during more than three centuries, blasting the lives and happiness of millions.

As a regular issue, heresy became prominent in Western Christianity only with the revival of learning. But the struggle, when it came, was even more frantic than it had been in the east. One of the minor controversies in early Byzantium had concerned whether the body of Christ were incorruptible. In early modern Europe, the greatest one concerned whether, or to what extent, it might be edible. The wars of religion, fought ostensibly to settle this point, lasted more than a century, ending only in 1648. The internal persecutions died out only in the century following this. The point had not been settled. What happened was that the educated classes for the most part found other interests. Toleration was, at first, the child not of agreement, nor of mutual charity, but of indifference.

An obvious reply to this, of course, is that the spirit of persecution is now almost entirely alien to Christianity. So, in doctrinal matters, it is. To a Catholic, Protestants are no longer damnable heretics. Since the Second Vatican Council, it has been felt more appropriate to call them "separated brethren". Few Protestant leaders have appeared unwilling lately to be photographed beside the Pope. No respectable divine now blames the Jews for having killed Christ. Moslems and Hindus are invited to ecumenical services, and are even welcomed when they occasionally

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turn up. This flabby syncretism may have done much for the public order. It has certainly been carried to an extent embarrassing to the more thoughtful Christians. If He can be approached by other paths, which are equally valid, why should God have sent His only begotten Son to be scourged half to death and then nailed to a cross? If the Hindu can have a thousand gods, what was so bad about the Classical Pantheon? Doctrinal persecution is certainly alien to the larger of the modern churches. But this kind of it is only the more noticeable - because, since the Enlightenment, the more shocking - half of what Christianity has been taken as standing for.

The general case for persecution was most clearly stated by Ambrose, Archbishop of Milan in the fourth century. To have - or to be able to acquire - the means of suppressing what is abominable to God, and not to use them, he told the Emperor, is to partake of its guilt.²²⁸ Evidently, this applies in any dispute as to the nature of Christ. It applies equally with regard to observing his moral teachings, apparent or inferred. Following from this second conclusion, politics, already subordinated to religion, becomes wholly fused with it. For example, in the Pagan Empire, divorce was easy; suicide carried little reproach; homosexuality was variously honoured or ignored. Each is said to be a sin. In Christian Europe, each was at least discouraged by law. And, if they have explicitly rejected the first conclusion, most Christians continue to argue and behave as though they still accepted the second. Few seem willing to disclaim the right to impose their moral code on others. Perhaps the Hierarchy in Catholic Ireland might never dream of trying to hold an *auto da fé* in Phoenix Park. It has, nevertheless, opposed every effort made to legalise birth control. The Church of England hires its buildings out for every purpose, from revivalist baptisms to Rastafarian pot parties. Some of its ministers have even tried giving religious sanctuary to a Trotskyite atheist. When the question arose, of letting the shops open on Sundays, it took up the full jargon of the Oxford Movement, and proclaimed England still to be a "Christian country".

If, then, a Christian of the above kind could be persuaded that smoking were in some respect sinful, he would be logically obliged to advocate measures against it. He would be obliged to

²²⁸ See Edward Gibbon, *History of the Decline and Fall of the Roman Empire* (1776-87), 'Everyman' Edition, J. M. Dent and Sons, London, 1962, vol. 3, p. 119 (or, in any edition, the first paragraph of chapter XXVII).

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become more extremely and fanatically intolerant on the issue than Action on Smoking and Health and the British Medical Association combined. The secular case against tobacco is that it leads to illness. More or less its grimmest claim is that 'patients who ultimately die from chronic bronchitis or emphysema usually endure about ten years of distressing breathlessness before they die'.²²⁹ This is sad. What is it, though, compared with the sufferings of the damned - in that place 'where their worm dieth not, and the fire is not quenched'?²³⁰ This is what may lie in wait, either for the sinful smoker, or for the undutiful brother in Christ who left him unsupported in his weakness.

II Is Smoking Sinful?

Anyone finding this unlikely might care to note that smoking actually has in the past been regarded as sinful. In the seventeenth century, Catholics were threatened with excommunication if caught pipe in hand. In Calvin's Geneva, it was not only banned, but the ban was placed among the Ten Commandments. The secular arm gave its usual support. German smokers faced the death penalty until the end of the century. In France, Louis XIII, though not so drastic, still tried forbidding the use of tobacco except by medical prescription.

If smoking really were a sin, and the advocacy of persecution were a requirement of the Faith, then persecution is what the true believer must, in all conscience, advocate. And this is one reason why our present enquiry is an entirely proper one. It might tell the non-believer what to expect should Christianity ever become less languidly militant than it admittedly now for the most part is, even in those matters on which it continues to claim a special authority. Or it might furnish him with useful arguments. But, as justifications go, it is highly contingent. Ten or twenty years ago, when religion seemed on the whole to be a declining force in human affairs, it would have been less useful than it is today, when the reverse may be true. In ten or twenty years time, it may be of no account whatever, or of burning importance.

²²⁹ Warning made in 1971 by the Royal College of Physicians; quoted Whitaker, *op. cit.*, p. 147.

²³⁰ Mark, 9:44 (repeated 9:46).

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The second justification is not at all contingent for the average non-believer. He may laugh at religion. He may give deliberate offence to others, by calling it a superstitious frenzy or a device for keeping people quiet. Even so, his entire philosophical outlook requires a religious foundation. This religion need not absolutely be Christianity. But it must be something very similar to it. For, without God, there is no morality. I could try supporting this simply by giving a short history of the present century. Christ had more than trees in mind when saying “by their fruits ye shall know them”.²³¹ But I will adopt a more rigorous proof.

III The Nature of Morality

Whatever I feel I know directly. What you feel I can know only by guessing from your outward appearance. Given sufficient power of will, you could hide your last agony from me. Even made aware of this, I should feel only sympathy for you. This is a sentiment stronger in some of us than in others; and it depends in all of us on the attending circumstances. Imagine, then, that I am bigger than you, and have lured you to a place where I feel secure of there being no witnesses. Assuming that the act, or its consequences, gave me enough pleasure to overbear whatever feelings of sympathy I might harbour, state one reason why I should not cut your throat.

You might say that it would be wrong. But this is no final answer. I ask what is meant by the words ‘right’ and ‘wrong’. Broadly speaking, there are in secular moral philosophy two modes of justifying the use of these words.

According to the first, they are terms of shorthand, applied to actions or rules of conduct, in so far as these are believed useful to the welfare - however this be defined - of a certain group. To the main sort of utilitarian, my cutting your throat, leaving aside any distress caused to you, might serve as a precedent to other acts of murder. Indeed it might. It might also be that if life and property were held in less general respect than they are, there would be much less of both. Were the common good my standard for measuring conduct, killing you would certainly be wrong. I

²³¹ Matt., 8:20.

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am not talking generally, though, but about me. If it should stand between me and what I want, I see no reason for not ignoring the common good. You might tell me that doing so is in my 'real' interest; that my setting a bad example raises my own chances of being murdered. None of this touches me. I am the best judge of what is good for me. If I compare all the advantages, present and remote, of killing you, with the small chance that the finding of your body might encourage some stranger to knock me on the head, and they remain positive, I still see no reason to put the knife away. As a theory of what the laws should be, utilitarianism is wonderfully convincing. For an individual's moral obligation to obey them, it gives no basis whatever.

You might turn, then, to the second of the two modes. According to this, right and wrong are the opposing extremes on a scale of values, the existence of which latter may be deduced from observing the order and harmony of the material world. Every existing thing is said to have its own natural function. The function of man is to live as a rational being. In other words, my harming you would be a breach of the 'natural law', and a violation of your rights under it. I could as easily quote Aristotle or Aquinas on this point. Instead, I go to Ayn Rand: 'Rights are conditions of existence required by man's nature for his proper survival. If man is to live on earth, it is right for him to use his mind, it is right to work for his own values and to keep the product of his work. If life on earth is his purpose, he has a right to live as a rational being: nature forbids him the irrational.'²³² If you could harangue me on this lofty theme, for long enough, and with enough eloquence, you might, perhaps, make my heart bleed, and thereby have me put the knife away. But you might do this just as well by describing the tears of an imaginary wife and a few children. Utilitarian arguments are valid, even if less widely than those putting them often claim. This sort of natural rights argument is simply absurd.

In the first place, since Rand was an atheist, the words natural law as used by her are meaningless. They are what Roscclin is said to have called a *flatus uocis* - or, to translate him crudely, a verbal fart. A law can be one of two things. It can be a command, to disobeying which a penalty is attached. It can be a statement of what is seen invariably to happen. The words 'if

²³² Ayn Rand, *Atlas Shrugged*, quoted in Ayn Rand et al., *Capitalism: The Unknown Ideal*, New American Library, New York, 1967, p. 323 (her italics).

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a man lie with a beast, he shall surely be put to death: and ye shall slay the beast²³³ constitute a law. The words ‘a projectile having an escape velocity of less than seven miles per second cannot be sent beyond this planet’s gravitational field’ constitute a law. The words ‘cutting my throat would be a violation of natural law’ constitute ten words. I expect no punishment if I kill you. I expect no difficulty in killing you.

In the second place, the whole natural law tradition, atheist or religious, is based on a defective epistemology. It begins with Aristotle. He claimed not only that “the beginning of our knowledge lies in the senses”, but also that what we perceive with them is an objectively existent reality. To the left of my wordprocessor keyboard, I see a cup of coffee. Let me confirm this with a few basic tests, and, in Aristotelian terms, I have reason to believe that this object exists, and will continue in existence whether I look away, or leave the room, or drop dead.²³⁴ Following this view of sensory perception, Aquinas went so far as to assert that, while the highest knowledge comes from God alone, “there are some truths which the natural reason also is able to reach, such as that God exists.”²³⁵ Ayn Rand, though she never formulated anything so brilliant as the five empirical ‘proofs’ by which Aquinas sought to show this, was no less ambitious. From her belief in an objectively existent reality, she claimed to derive an objectively binding moral theory.²³⁶ While arriving at radically different conclusions, the Marxists begin with the same presumption. To them, at least some people are able to know what reality is. Nearly every other rationalist scheme is similarly based.

Yet it should be obvious that no conclusion is ever more secure than the premises on which it rests. Imagine that I land on a desert island and, coming across a bone, say “I think this may be

²³³ Lev., 20:15.

²³⁴ Aristotle, *Metaphysics* I, 1, and *Posterior Analytics* II, 15, *et passim*.

²³⁵ Thomas Aquinas, *Summa Contra Gentiles*, Lib. I, cap. iii. All translations from this work are my own. Those from the *Summa Theologiae* are either compared with those of the Dominican Fathers or are followed entirely. As for this rationalist claim, it is still formally upheld by the Roman Catholic Church. See H. Denzinger, *Enchiridion Symbolorum*. 1806: “If anyone shall deny that the one and true God our creator and Lord can be known through the creation by the natural light of human reason let him be anathema.”

²³⁶ For the clearest and longest development of Rand’s epistemology, see David Kelley, *The Evidence of the Senses: A Realist Theory of Perception*, Louisiana State University Press, 1986.

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part of a human skeleton. Therefore civilised men once lived here". My argument would be invalid. For the same reason, so are those of the rational moralists. To see this as clearly as possible, let us state the premises of their argument. These are that we perceive things as they really are, and that we use our reason to understand their nature. Let us take them in reverse order.

What allows us to make sense of the external world is the notion of cause and effect. Believing that event A is the cause of event B is our means of explaining or predicting the one from observing the other. I wake and measure the temperature outside. It is five degrees Centigrade. I see a thick frost on the ground that was not there the previous night. I believe the cause of frost to be sub-zero temperatures. Therefore, the temperature in the intervening time has been lower than it is now. Likewise, I measure the outside temperature at midnight. It is minus five degrees. I anticipate frost in the morning. Everyone uses this kind of reasoning. Yet it has itself no rational basis.

I paraphrase David Hume. One billiard ball that is in motion strikes another that is at rest. The first loses its motion. The second acquires one. If we examine these events, we reach three conclusions. First, they occur in a particular order of time. One ball is in motion before the collision, the other one after it. Second, the balls touch for their changes of behaviour to occur. Third, if we recall every previous like situation known to us, events have always proceeded in a like manner. Beyond this, we see nothing else. When we talk about the communication of force, we are not describing anything that we have seen, but only a collision of billiard balls. Nor are we stating a logical necessity. Anyone never having seen such a collision, or anything analogous to it, could just as easily imagine the two balls stopping or bouncing back from each other. Force is an inference from the constant conjunction of these events, not an explanation of it. If we predict their continued subsequent juncture, we are assuming that the future will be like the past - an assumption which, by its nature, we cannot prove. I now quote Hume: "[T]here is nothing in any object, consider'd in itself, which can afford us a reason for drawing a conclusion beyond it; ... even after the observation of the frequent or constant conjunction of objects, we have no reason to draw any inference concerning any object beyond those of which

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we have had experience.”²³⁷ What inferences we do draw are the product of an habitual association of ideas, rather than the conclusions of our reason.

This said on the relationship of objects to each other, I turn to their existence. I think again about my cup of coffee. What do I know about it? If I wish, I can make myself see a pattern of colours. I can feel a warm, smooth solidity. I can smell something. I can taste a pleasant bitterness. At no point do I ever perceive a cup of coffee. I experience sensations of one. This is not playing with words. Sensations are separable from objects, and, so, are not necessarily dependent on them. When asleep, I have known very satisfactory cups of coffee without one ever having been ‘really there’. It is easily conceivable that the whole universe is no less a figment of my imagination. If a sceptic never acts on this doubt, it is because the habit of believing in reality was securely fixed before he could begin reasoning about it.

Finally, there is the matter of whether the self can be proven to exist. It might be thought, following Descartes, that the assertion “I think, therefore I am” is “so certain and so assured that all the most extravagant suppositions brought forward by the sceptics were incapable of shaking it.” The syllogism cannot be false. If it were, I should be mistaken; and, to be mistaken, I must still exist.²³⁸ That it is true I can scarcely deny. But it is only true at the moment of its conception. I exist now. I have no proof that I existed yesterday. In the film *Blade Runner*, one of the characters believes that she is a real person, and that she has memories extending back about thirty years. In fact, she is an android, at most a few months old. The memories were programmed in by her maker. I have no assurance that I am any different; that, when I woke this morning, I had not just been brought into being complete with memories of a past existence. For that matter, I have no assurance that I was not brought into being an hour ago, or five minutes ago, or one second ago - or at any moment prior to the one of which I am immediately aware. Memory can be tampered with. Also, the future is entirely unknown and unknowable. I have no more certainty that I shall still exist then than that I existed in the past. In just what ‘the

²³⁷ David Hume, *A Treatise of Human Nature* (1739), Book I, Part III, section xii.

²³⁸ René Descartes - *Discours sur la Méthode* (1637), part four. See also Augustine (354-430) - *De Civitate Dei*, Lib. XII, c. 26: *Si fallor sum*.

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present' consists no one understands. It may be an irreducible but definite particle of time. It may be an infinitely fine division between past and future. In either case, rational knowledge of personal existence is far less certain than it may at first seem.

IV The Limits of Reason and Scepticism

"Which of you" said Christ, "by taking thought can add one cubit unto his stature?"²³⁹ Which of us indeed? For all the claims made on its behalf, reason, by itself, tells us nothing about the world. Aware of this, we are free to choose two courses. The first is to retreat into absolute or moderated scepticism. We can take the mental habits referred to above as our sole guide, and not worry about their lack of rational basis. We can carry on talking about morality, and sometimes even half believe ourselves - but only in so far as we wish to influence the behaviour of others who still believe the concept to have any clear meaning. Otherwise, we can accept that God exists, and that questions about His purpose in having placed us here are entirely proper. I should stress that I am not proving His existence in any general way. I am simply asserting its logical necessity for certain kinds of thinking. If we want to use the words 'right' and 'wrong' and 'rights' and 'nature', and want them to mean anything, we must understand that reason is not a self-contained entity, but a meditation on faith. It need on this account be no less powerful, nor usually any less deadly against credulous stupidity. It must nevertheless, be considered as a strictly secondary force. *Credo ut intellegam*, said Anselm - "I believe so that I may understand."²⁴⁰

V Fundamentals of Christian Theism

Let us, then state what it is necessary for us to believe before we can hope to understand. In doing this, we also state the minimal assumptions of Christian theism:

First, there is a God, who is the supreme, benevolent Governor of the universe.

²³⁹ Matt., 6:27.

²⁴⁰ Anselm (1033-1109), *Proslogion*, cap. 1.

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Second, He has established a code of morality, and dispenses punishments and rewards according to how we conform to it.

Whether or not either of these is true - or, if true, can be proven - is presently of no account. A Christian is defined by adherence to them. They underpin the thought of nearly everyone else. From the first, we deduce the existence of an orderly external world, and of ourselves within it through time. Being Supreme, God can be “the Maker and Preserver of all things, both visible and invisible”.²⁴¹ Being benevolent, He is that Maker and Preserver. Otherwise, there must be a chance of my being a deluded spark of instantaneity, and everything else, including you, nothing at all. This would be incompatible with the Divine Nature as stated. From the second, we derive both an absolute morality and a firm reason for keeping to it.

VI Natural Law and Morality

Furthermore, the existence of the world having been shown a necessary consequence of the first assumption, it seems reasonable to suppose that the various articles of this morality might be revealed to us, not merely by the directly inspired Word of God, but also by the fundamental nature of His Creation. We can seek guidance from Paul’s Letter to the Romans - “Thou shalt not commit adultery, Thou shalt not kill, Thou shalt not steal, Thou shalt not bear false witness, Thou shalt not covet; and if there be any other commandment, it is briefly comprehended in this saying, namely, Thou shalt love thy neighbour as thyself.”²⁴² Or, although our paths of reasoning merge only after having sprung from different sources, we are perhaps able now to agree with Aquinas that

there is in man a first, innate inclination to good, which he shares with everything so far as it desires the maintenance of its existence according to its own nature. Through this, the natural law pertains to all that serves the continuation of human life and all that impedes death. Second, he is inclined to certain more specific ends according to the nature which he shares with the other animals. Those ends

²⁴¹ From the First of the 39 Articles of Religion to which all Anglicans are supposed to assent.

²⁴² Rom., 13:9.

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are termed part of the natural law 'which Nature has taught all animals' - such as the attraction of the sexes, and rearing of children, and like things. Third, he is inclined to good according to his rational nature, which nature is proper to man alone. So he is inclined by nature to seek knowledge of God, and to live in society. Under the heading of natural law come all acts pertaining to this inclination - chiefly that he should avoid ignorance, and be honest in his dealings, and all other such actions.²⁴³

VII Reason and Revelation

These both might seem on first glance very different approaches to morality. But the first premise of our current scheme of arguing is that there is a fundamental harmony of reason and revelation. According to Aquinas, the specific nature of man is to use his mind, and to observe a morality which is rationally deducible by a process of observation. It is with regard to his reason that man is distinct as a species from the other animals. This is no necessary denial of those parts of his nature which are generic to him and all other things, in so far as these are required for his sustenance as a moral individual, or to the propagation of his species. According to Paul, we are obliged as God's creatures to a certain course of action. Some aspects of this he states explicitly. Others he leaves to our own finding, having indicated a method of finding them. It is evident that, if we are to follow this course, we must do whatever is conducive to following it most effectively. This surely means that, unless directed otherwise by our primary purpose as moral beings, we are to seek the continuation of our lives. Therefore, by whichever of the ways we care to proceed, there is no contradiction of the other. According to either, an act can be sinful in itself - directly against God or against nature - or, though apparently indifferent in itself, connected by association with whatever sin to which it might tend. To return to the example given above, my cutting of your throat for pleasure or gain would be a contravention both of Paul's injunction against killing, and of our natural requirement to be honest in our dealings with others. My merely producing the knife, on the otherhand, would be indifferent or sinful depending on what use for the thing I had in mind.

²⁴³ Thomas Aquinas (1226-74), *Summa Theologiae*, I-II, 94, 2. The embedded quotation, *Quæ natura omnia animalia docuit*, is unidentified in my text.

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All which having been said, we move to an examination of the first part of our question posed initially - namely, of those ways in which smoking might be held contrary to nature, or to the otherwise known will of God, and therefore in both cases sinful.

VIII Smoking and Natural Law

Now, if there is any fact about smoking more certain than its dangers, it is that people find it enjoyable. Its very dangers, indeed, are testimony to its pleasures. Smoking kills, people are told; and they continue to smoke, even if in diminishing numbers. I recognise that I am discussing pleasures which I have never experienced, and which no person who has seems able to describe to me. But I am quite sure that they exist. Anyone who makes it his business to go about denying this is an unimaginative fool. Tobacco has many pleasant effects, and their type and degree is oddly contingent on what they are wanted to be. It can soothe the nerves after they have been strained. It can steady them when some particular act of judgment or resolve is called for. It makes the company of friends more cheerful. It makes up for lack of company. Smoking can be very enjoyable.

It is, moreover, the most universal of those pleasures which we do not also share with the animals. Just when and by what means the American Indians discovered to what use the cured leaf of the plant *nicotiana tabacum* could be put is unknown. But its use was the one Indian custom which the conquering Spaniards not only never tried suppressing, but actually themselves adopted. Once revealed to the world, it spread within a few decades to every part of humanity not absolutely shut away from foreign trade. Tobacco was smoked in England and in Spain, in Mecca and in Rome, in Russia, in China, in Japan. Peoples utterly dissimilar in every other respect of manners had tobacco smoking in common. No kind of religious observance, nor eating bread, nor drinking alcohol, were so widespread. Even in those times and places until recently where smoking was difficult or unfashionable, tobacco was instead chewed or ground up and sniffed. Use of the plant has been no passing craze. It is no custom, like eating hamburgers or wearing jeans, which has been associated with any particular way of life, and is often embraced or rejected as part of that greater whole. It is a pleasure common to the whole

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of mankind. No one who identifies pleasure with sin could ever fail to notice it. And that there have been, and still are, Christians who believe in this identity is undeniable.

IX **Pleasure and Sin: The Christian Case Against Puritanism**

While there had been a small ascetic movement throughout the first three Christian centuries, it had its real beginning and most spectacular phase in the period following the conversion of the Roman Empire. Their faith no longer persecuted - and soon, indeed, became a condition for public advancement - the more severe Christians began withdrawing in great numbers into the Syrian and Egyptian deserts. They saw the pleasures and conveniences of city life as so many snares of the Devil. Their belief was that, the greater the misery they could suffer on earth, the more certain and the sweeter their bliss would be in Heaven. Their biographies stagger the mind. How much is recorded truth, and how much wishful thinking or plain falsehood, is often impossible to say. One Macarius of Alexandria is said to have slept in a marsh for six months, and to have welcomed the continual mosquito bites there as so many Divine gifts. Others of his kind are said to have carried iron weights strapped on their bodies, or to have passed whole months in clumps of thorn bushes, or to have fasted themselves into blindness, or to have eaten only filth, and that very seldom. They never washed or changed their clothes. Some crawled round under the Egyptian sun, naked except for their long hair. Of all these, though, none was so memorable as Simeon Stylites. A youth of thirteen when he left shepherding and became a monk, one of his penances was to tie a rope about himself so tight that parts of his body began putrifying. According to Antony, his devoted biographer, "[a] horrible stench, intolerable to the bystanders, exhaled from his body, and worms dropped from him wherever he stood, and they filled his bed."²⁴⁴ At last, persuaded to leave his monastery, he ascended to the top of various columns, the last of which being sixty feet high and six wide. There he remained until his death, thirty years later. He is said once to have stood for an entire year on one leg, the other covered by open ulcers. Antony perched beside him, picking up the maggots that fell down and replacing

²⁴⁴ Quoted in William Edward Hartpole Lecky, *History of European Morals from Augustus to Charlemagne* (1869), Longmans, Green & Co., London, 1911, vol. 2, p. 112.

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them. "Eat what God has given you", said Simeon.²⁴⁵ He was among the most celebrated men of his age. Pilgrims visited him from as far away as India. The Emperor Theodosius II consulted him on affairs of state. His funeral procession was followed by the Patriarch of Antioch, a government minister, six bishops and a small army. His image is still to be seen, painted on church walls throughout the Eastern Patriarchates.

Our own history offers nothing quite so colourful as this. Thomas Beckett and Thomas More, our most famous ecclesiastics, both had ascetic turns of mind. But our closest national approximation was made by the Puritans of the seventeenth century. Some never closed their eyes without visions of hellfire crowding into their minds. Their loathing of everything frivolous, or even tending to enjoyment, amounted at times to a mania. "The Puritan hated bearbaiting" said Macaulay, "not because it gave pain to the bear, but because it gave pleasure to the spectators."²⁴⁶ Their political ascendancy no sooner began than was over. Their influence continued to be felt. It has certainly bequeathed us the most unendurable Sunday in the free world. Its afterglow may provide much of the energy to the anti- smoking pressure groups. Virginia Woolf's maternal grandfather was a pleasure-hating evangelical of the simplest kind. He smoked a cigar once, "and found it so delicious that he never smoked again."²⁴⁷ This is perhaps to be expected. But the same views were held by many Victorians who had abandoned every other tenet of their childhood faith. Frances Newman, younger brother of Cardinal John Henry Newman, though an ardent free thinker and radical, was just as strongly against tobacco - and, for that matter, alcohol, bright clothes and sex.

When I was first at school, I came across a boy who seemed as capable as anyone else of observing the world, but who had drawn a very strange conclusion. He had noticed how, when he fell and cut himself, our teacher would rush over and comfort him with plasters and little hugs.

²⁴⁵ Ibid.

²⁴⁶ Thomas Babington Macaulay, *History of England from the Accession of James II* (1848-61), 'Everyman' Edition, J. M. Dent & Sons Ltd., London, 1910, vol. 1, p. 129 (or, in other editions, the eleventh paragraph of chapter II).

²⁴⁷ Leslie Stephen (the novelist's father), quoted in Gertrude Himmelfarb, *Victorian Minds*, Weidenfeld and Nicolson, London, 1968, p. 310.

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Sometimes, she would even let him off punishments for what he had done earlier in the day. Therefore, whenever he felt neglected, or thought he had done anything slightly naughty, he would stab some part of his body with a compass until he began to bleed. Fifteen hundred years ago, he would have grown into a desert saint. Alive today in the Phillipines, he would long since have taken to pushing skewers through his cheeks, or cutting his nipples off. As it is, he may well currently be a noted puritan in his own little circle. There would be no change of attitude required. The association of pain with holiness is one less of logic than of psychology. To hope that those martyred in His Name earn some special favour in the eyes of God is perfectly reasonable. It is, at any rate, a credit to humanity. To suppose that anyone can gain grace simply by rotting away, of his own volition, on top of a column, or denying himself every bodily pleasure, is childishly absurd. In so far as the ascetic state hinders the rational function of mankind - and its more extreme varieties certainly must²⁴⁸ - it is against nature. Even the purely negative varieties are an abuse of it. Anyone who has laughed for five minutes at a time, or chatted awhile with friends, will know how generally good some kinds of enjoyment are to the body and soul. There are texts in the Bible which, taken in isolation, approve the self-denial of every pleasure.²⁴⁹ But a fine answer to anyone who delights in finding these and bringing them out when others look happy, is to read from that entire book which opens with the words "[l]et him kiss me with the kisses of his mouth: for thy love is better than wine";²⁵⁰ and continue till he goes away or faints with shock. Christ himself appreciated the pleasures of friendship. Certain theologians can put whatever bizarre gloss on it which takes their fancy. To any candid reader, the Last Supper can only be a touchingly human occasion. Here is a man facing inevitable death. Does he pass his last evening in a final round of fanatic penances? He does

²⁴⁸ "This voluntary martyrdom [of Simeon Stylites] must have gradually destroyed the sensibility both of the mind and body; nor can it be presumed that the fanatics who torment themselves are susceptible of any lively affection for the rest of mankind. A cruel, unfeeling temper has distinguished the monks of every age and country: their stern indifference, which is seldom mollified by personal friendship, is inflamed by religious hatred; and their merciless zeal has strenuously administered the holy office of the Inquisition", Gibbon, *op. cit.*, vol. 4 [chapter XXXVII], p. 18.

²⁴⁹ See, for a very notorious instance of this, Eusebius, *History of the Church*, Book V, c. 8. When about twenty years old, Origen of Alexandria, an enthusiast from his earliest boyhood, considered the text of Matthew, 19:12 - "For there are some eunuchs, which were so born from their mother's womb: and there are some eunuchs which were made eunuchs of men: and there be eunuchs which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it." His mind made up, he immediately castrated himself. He realised only some while later that his exegesis had been too literal. His story can be taken as illustrating more than one moral.

²⁵⁰ Song of Solomon, 1:2.

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nothing of the sort. He arranges a dinner with his friends. “With desire I have desired to eat this passover with you before I suffer” he tells them.²⁵¹ He tries letting them down gently from their expectations of what his kingdom will consist in. Exactly what he would have made of Simeon Stylites is rather hard to imagine. Very likely, he would not have approved. Almost certainly, he would not have been approved of.

Pleasure cannot be regarded as bad. In many respects, it is as proper to our nature as is eating or sleeping. But, of course, this is no end to the matter. Though pleasure is not in itself bad, only certain kinds of it can be thought entirely legitimate; and there are many kinds which are absolutely illegitimate. That kind potentially involved in murder has already been discussed. It remains open to say that smoking comes into the class of illegitimate pleasures.

X The Issue of “Addiction”

It can, in the first place, be called an addiction - this is to say, a subordination of the rational faculty to the purely animal appetites. If indeed this, it could be likened to alcoholism; and “[b]e not among winebibbers” says Solomon; for he shall come to poverty.²⁵² Nor, says Paul, shall he inherit the Kingdom of Heaven.²⁵³ Efforts to prove that smoking really is a similar activity form a considerable share of the medical and polemical literature on the subject. I return to M. A. H. Russell, already quoted above. “Cigarette smoking” he says, “is probably the most addictive and dependence-producing object-specific self-administered gratification known to man.”²⁵⁴ He continues elsewhere that “[n]ot with alcohol, cannabis and possibly even heroin is the addiction so easily acquired.”²⁵⁵ “[I]t requires no more than three or four casual cigarettes during

²⁵¹ Luke, 22:15.

²⁵² Prov., 23:20-21.

²⁵³ 1 Cor., 6:10.

²⁵⁴ M. A. H. Russell in 1976, quoted in Ashton and Stepney, *op. cit.*, p. 53.

²⁵⁵ M. A. H. Russell in 1977, quoted *ibid.*, p. 140.

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adolescence virtually to ensure that a person will become a regular dependent smoker.²⁵⁶ ‘Once a smoker - always a smoker.’ This is only a slight exaggeration. It is unlikely that more than one in four smokers succeeds in giving it up for good before the age of sixty.²⁵⁷ Certainly, if the regular smoker could be identified with the habitual drunkard or opiate addict, the natural law verdict would be a foregone conclusion. But it is open at least to doubt whether this has been properly done. If we follow the usual medical definition, drug addiction, or - to adopt the favoured terminology of the World Health Organisation since 1964 - drug dependence, requires for its diagnosis the joint presence of three conditions. First, there is the pleasurable alteration of mood. Second, there is an increasing tolerance of whatever substance is taken, with a concomitantly required increase of dose to maintain its effect. Third, there is the occurrence of pain, mental or physical, on the ending of regular indulgence. Let us see to what extent these are characteristic of cigarette smoking.

Its pleasurable effects I have already mentioned. These are real enough. The plain fact, however, is that they differ from what we normally call intoxication not merely in degree, but also in nature. The effect of alcohol is to dull or even to suspend the workings of our more rational nature. Continued indulgence, on a large enough scale, is enough entirely to destroy them. The effect of nicotine is simply to alter them in various, comparatively mild, ways. No person of reasonably firm mind will go out of his way to avoid a group of people in the street just because he suspects most of them to have been smoking. Nor, if he is driving, will he feel inclined to slow down or move into another lane if he notices in front of him another driver who, to his certain knowledge, has smoked five cigarettes earlier in the evening. No one - at least, to my present knowledge - has ever smoked himself into an ungovernable rage, nor, for that matter, into Cardboard City. Assuming decent ventilation, I have never once thought any conversation with smokers a waste of my time simply on account of their smoking. It cannot, therefore, be said that the pleasures of the activity are in themselves gross and animalistic.

²⁵⁶ M. A. H. Russell in 1971, quoted *ibid.*

²⁵⁷ M. A. H. Russell in 1977, quoted *ibid.*

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The broad pattern of alcoholism is too well-known to require much telling. It begins usually with the drinking in company of ale and beer or the lighter wines. These soon having lost their satisfying effect, it then progresses, either directly or through the fortified wines, to spirits. The point is eventually reached where, to produce the desired effect, amounts of alcohol are regularly consumed which would kill a moderate drinker or teetotaler several times over. This pattern is common to many other drugs. Dependence on amphetamine has been known to lead to a progressive escalation of dose from a daily 10mg to 1,000mg. The same is often true of heroin and the other opiates. It is not the case with nicotine. Many smokers do move on from an initial five or ten cigarettes per day to twenty or even forty, but hardly ever go beyond this. True, there are practical limits on the number of cigarettes that can be smoked per day: even one every fifteen minutes only amounts to sixty in fifteen hours. But it would be possible to increase the amount of nicotine absorbed by inhaling more deeply, or changing to stronger cigarettes or to cigars or to using a pipe. There is no evidence that this happens to any considerable extent. The evidence seems, indeed, to indicate that there is no need for much escalation of dose. After even years of regular smoking, those areas of the brain affected by nicotine retain most of their initial sensitivity.²⁵⁸ No hardened spirit drinker will regard a pint of weak lager first thing in the morning as anything but distinctly second best - and perhaps not even as that. A smoker tends to find one favourite brand of cigarette and thereafter to stay loyal to it; and each morning's first lighting up, in the absence of any breakdown of health, remains no less pleasurable.

Some smokers do come to rely on their cigarettes to an extent where giving them up is an often painful effort. Yet giving up typically involves a depression and irritability which becomes fairly intense after a day or so, and then steadily reduces. But there is nothing about the initial physiological effects comparable with the hallucinations and convulsions that the normal alcoholic feels on drying out. It seems, also, that only a minority of smokers are dependent on nicotine. According to Russell himself, this becomes apparent only when twenty or more cigarettes are smoked per day.²⁵⁹ Yet, in a survey of British smoking habits the results of which

²⁵⁸ For a fuller discussion of this point (of which my own is very largely an abridgement), see Ashton and Stepney, *op. cit.*, pp. 58-60.

²⁵⁹ M. A. H. Russell in 1980, quoted in Ashton and Stepney, *op. cit.*, p. 141.

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were published in 1980, 25 per cent of current smokers claimed a daily consumption of ten cigarettes or less; and 62 per cent of female and 48 per cent of male smokers claimed one of twenty or less.²⁶⁰ It should also be said that, in the ten years to 1987, 20 per cent of British smokers are believed to have given up.²⁶¹ These figures hardly support Russell's bolder assertions. Even with heavier smokers, there are too many instances of a sudden stopping without apparent withdrawal symptoms for the normal concept of dependence to apply in full.

XI Is Smoking "Unnatural"?

In the second place, in the argument over its legitimacy as a pleasure, smoking might be said to involve an unnatural use of a bodily function. "If God had wanted us to smoke" the saying goes, "he would have given us chimneys out of our heads". Plainly, it requires the drawing of tobacco smoke into the lungs, where nicotine can be absorbed into the bloodstream and carried thence to the brain.

Equally plainly, the lungs are not suited to this function; and they quite often fail under the strain put on them. But, to the extent that the natural function of the lungs is to introduce oxygen into the lungs, and that natural functions represent the will of God, it does not automatically follow that smoking is sinful. There was a time when it was believed that it had a useful medical purpose. It was thought a good prophylactic against the plague, and a cure for, among other maladies, headaches, gout and scabies. As late as 1901, the pharmacological authority, W. Hale-White, actually recommended it for the treatment of respiratory disorders.²⁶² So long as this belief could be held, smoking, whatever its general merits, could be regarded as a proper activity within certain limits - just as puncturing the veins with needles is not today thought improper when its purpose is the maintenance or restoration of health. The present medical consensus is that tobacco has no therapeutic value. This consensus can, however, be challenged. One of the

²⁶⁰ Office of Population Censuses and Surveys, 1980, quoted *ibid.*

²⁶¹ Whitaker, *op. cit.*, p. 153.

²⁶² Whitaker, *op. cit.*, p. 146.

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main purposes of the anti-smoking lobby, it seems is to link smoking with as many illnesses and defects of character as is humanly possible.

Thus, it has by now been associated with everything from childbeating to sleeplessness, and from careless driving to ulcers. Unlike with the various cancers, however, the precise causal sequence in these cases has not been fully established. It is possible that people who smoke increase their chances thereby of suffering these things. It might, on the other hand, be that those people already likely to suffer them are drawn to smoking; and that smoking might - admittedly at the possible cost of more serious problems later - alleviate them. In its essentials, this is no new argument. The late T. E. Utey was convinced that tobacco, with its soothing effects, had prevented many suicides and the occasional murder.²⁶³ Writing some years ago in *The Guardian*, Polly Toynbee declared that "I don't want to scream and yell at the family, so I smoke."²⁶⁴ Around the same time, in the *The Daily Telegraph*, David Loshak put the same more general case as stated above.²⁶⁵ Granting it were a correct one, smoking would not be an unnatural activity for such people. As Aquinas said, when discussing the concept of "nature", it may be "that something which is against human nature, as it may pertain either to reason or to the health of the body, may become natural to a man because of a certain deficiency in his nature."²⁶⁶

XII Is Smoking "Slow Suicide"?

Even if it definitely were shown not necessary in some people for the preservation of their health - or necessary in only an inconsiderable minority - it still would not have to follow that smoking were sinful. Going to Aquinas again, he doubts that uses of limbs or organs contrary to their apparent functions are in themselves bad. It need not be true 'that he sins who, for example, walks on his hands, or does with his feet anything which is more appropriately done with his

²⁶³ See his article, "Lighting up for Liberty", in *The Times*, London, 3rd August 1987.

²⁶⁴ See her article of that title in *The Guardian*, London and Manchester, 25th May 1981.

²⁶⁵ See his article, "A Whiff of Consolation for the Smoker", in *The Daily Telegraph*, London, 30th October 1981.

²⁶⁶ Thomas Aquinas, *Summa Theologiae*, I-II, 30, 4.

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hands.’²⁶⁷ Such acts become sinful only to the extent that they might impede a man’s nature. Obviously, the tendency of smoking is to shorten life, and this is about as severe an impediment as can be imagined. But not every shortening of life is equally a sin, or even actually sinful. As an act, it falls into not one but several categories. Before we can decide the status of smoking, we must first investigate into which of these its life-shortening tendency falls.

In 1658, the Jesuit priest, Jakob Balde, asked in a tract published in Nuremberg against smoking “[w]hat difference is there between a smoker and a suicide; except that the one takes longer to kill himself than the other?”²⁶⁸ Medicine being then in its infancy, and there being a complete lack of any statistical evidence for his claim, Balde should not be seen as some remote precursor of the Royal College of Physicians. He wrote at a time when smoking tobacco was a comparatively new activity in Europe, and, as said above, was illegal in many parts of it. What we have in this instance is, as part of a wider denunciation, a rhetorical flourish decked out with supporting evidence drawn from anecdote. Removed, however, from its particular historical context, this is an extremely grave allegation, and one which, if ever made out, would be final condemnation of smoking in Christian terms. For suicide is unequivocally a sin. It is a crime against human nature as defined above. It is held strictly analogous to murder - the separation by man of a union of body and soul made by God.²⁶⁹ It has, indeed, often been thought worse than murder - as a cowardly flight from those apparent sufferings by which God, in His infinite mercy, tests and refines His creatures.²⁷⁰ Three and a third centuries after Balde, the harmful effects of tobacco have been made out with an often alarming weight of evidence. It might be thought that the modern posters which I have seen put up in hospitals - telling me that “Smoking is slow Suicide” - had unquestionable authority behind them. They have not. That smoking tends to shorten life is undeniable. But, no less undeniably, the mere shortening of life is not

²⁶⁷ Thomas Aquinas, *Summa Contra Gentiles*, Lib. III, cap. cxxii. His main topic of discussion here is the interesting, and perhaps important, issue of whether fornication and sodomy involve an unnatural emission of sperm, and so hinder procreation.

²⁶⁸ Quoted, Ashton and Stepney, *op. cit.*, p. 4.

²⁶⁹ On this point, see Augustine, *op. cit.*, Lib. I, cap. 19.

²⁷⁰ For a most inspiring example of Divine benevolence in this respect, see the Book of Job.

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always suicide. If it were, the conventional judgments in church history would be radically at fault.

The anti-Catholic laws of the sixteenth and seventeenth centuries are one of the very few reasons for an Englishman to be ashamed of his history. Justifications have been attempted. But every persecution has been claimed by someone as necessary; and the merits of this one are no more nor less than any other. Lay adherents of the old religion were heavily discriminated against by law. Any of their priests arrested on English soil were subject, on proof of their status, to being hanged, then cut down while still alive, and disembowelled, castrated and dismembered. It was a horrible death; and it was made more horrible still when inflicted in the presence of a mob screaming its delight, and attended by every means of ensuring that the victim remained conscious as long as possible. Despite this, the English Mission was never short of recruits. Priests continued volunteering to come into England and perform those rites believed necessary for the salvation of those who remained Catholics here. One such was Thomas Macclesfield. He was arrested almost as soon as he landed. He was promised his release if only he would take the Oath of Allegiance to James I, so acknowledging his ecclesiastical jurisdiction under the Act of Supremacy. This was a real offer. It had been made to George Napper, another priest, in 1589. He had taken the Oath, and had been released. Another priest, Ralph Sherwin, though he turned it down, had even been offered an bishopric if he would only save his life. Macclesfield refused all inducements. The Pope was head of Christendom without rival or colleague, he asserted. He was hanged, drawn and quartered on the 1st July, 1616. He was aged 26. The youngest victim of this persecution that I can find was a youth of nineteen called James Bird. He refused the Oath, and was butchered in 1593. They died for their refusal to repeat a few dozen words which millions of others had repeated without hesitation, and which hundreds of thousands had repeated without believing. They died for what many, then and since, would call a trifle. To call their deaths suicide, however, would show not merely a gross lack of principle, but also a defective imagination. The Roman Church has canonised or beatified each of them.

Towards the end of the sixth century, there was a Bishop Salvius of Albi in France. During that century, the Mediterranean world had been swept by a wave of the most tremendous epidemics.

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At Constantinople, on the first appearance of the plague, in the year 542, the historian Procopius records that ten thousand people a day had died throughout the four summer months.²⁷¹ All order had for a while collapsed, as the normal bonds of one person to another were severed by fear. The sick were left to die untended. The healthy threw themselves into a round of orgies and rioting. Even outside the towns, whole regions became deserted, so that the crops rotted in the fields, and the cows went unmilked. At the first sign of plague in Albi, the usual panic occurred. People fled, leaving the sick behind. Salvius stayed with them. Whether by ordinary nursing or miracle, he kept the death rate below the level of catastrophe; and the epidemic abated. But he was one of its last victims.

His example is one chosen at random. There have been countless others, before and since. I think of the Belgian missionary, Joseph de Veuster, sent at his own request in 1873 to a leper colony in the Hawaiian Islands. He caught the disease himself, and died, still tending the sick, in 1889. A man who runs into a burning house to save a child is rightly thought brave. There are not words to describe someone who voluntarily and with premeditation risks life or health in the service of the infectious sick. Salvius was canonised. De Veuster is now called 'Venerable'.

But not every life-shortening act has been approved. There was in Africa once an heretical sect known as the Donatist Circumcelliones. Its members had conceived such a hatred of life and desire for martyrdom, that, driven by joyous frenzies, they would sometimes leap in great numbers from high cliffs, so that the rocks below were splashed red with their blood. Sometimes, they would stop travellers on the roads, and oblige them to inflict a killing blow, by the promise of a reward if they consented, and the threat of murder if they refused. This was accounted suicide.

There was another sect of heretics, this one in France, called the Albigenses. Many of these also wanted martyrdom. Their methods of seeking it - at least, before the Papacy took action against

²⁷¹ Procopius, *De Bello Persico*, Lib. XXIII, cap. 1. See also J. N. Biraben and J. le Goff, "La Peste dans le Haut Moyen Age", in *Annales: Economies, Sociétés, Civilisations*, 24 (1969), pp. 1484-1510.

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them - was rather more subtle. If ill, they would accelerate or provoke death, by fasting and occasionally by bleeding. These practices were accounted suicide.

The clear distinguishing principle in these instances is primary intention. In the first two, death was an effect of voluntary action. It was, however, a secondary consequence, a byproduct of something done with an entirely different main end in view. The recusants probably had no great wish to go through an agonising death. But, faced with this or apostasy from what they believed was absolutely true and right, they resolutely chose the lesser of evils. No more can it be thought that Salvius and De Veuster were seeking death directly. In the second two instances, it was sought directly - not, perhaps, as an end in itself, as the self-overdosing of some jilted shorthand typist of our own day might be presumed; but it was still sought for no predominating earthly reason. If I put a gun to my head, or lie in a hot bath and open a vein, my primary intention, in all probability, is self-destruction. If I light a cigarette, it is to absorb nicotine into my body. The one act is to end life. The other, in my own estimation, is to enhance it. If one effect of the second is to bring my death forward in some unknowable degree, this is not suicide. If I could somehow know that, by lighting up, I should be 'spending' a given number of minutes, it would still not be suicide. If I had it on the highest medical authority that one cigarette would kill me after five minutes, it would, again, still not be suicide. The same distinguishing principle applies as above. There may be no comparison between my own seeking of pleasure at inordinate cost, and the laying down by someone else of his life for the sake of others or in praising or holding fast to his God. But the sin involved here would be that of addiction - most definitely not of suicide. But this is an unlikely situation. In normal circumstances, the seeking of pleasure will be at an uncertain and perhaps long-delayed price.

In truth, the best analogy of smoking is not suicide, but working at a dangerous occupation. Take coal miners, for example. They notoriously place themselves in danger. Working at the coal face, they risk burial alive by collapsing tunnels; they risk being burned to death or suffocated by poisonous gasses. Even without these exceptional events, the environment of a coal mine is unhealthy. The air is loaded with silicious dust. Breathing it often leads to pneumoconiosis, a fatal lung disease. Crawling about for long periods places unnatural strain on the knee joints,

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causing arthritis. The wages offered for coal mining reflect these dangers. The work is for the most part unskilled manual labour. It requires endurance and some strength, but little in the way of initiative. In as much, then, as the wages offered are higher than those paid for labour of the same general grade on the surface, they incorporate a special premium for risk. They are an incentive for a man to put his life or long-term health in danger.

Now, whatever may be the state of affairs in other parts of the world, in this country, no one is compelled to take up any specific occupation. If a man decides to accept a coal miner's wages, rather than those of a shelf-stacker or static security guard, or of whatever other menial occupation might be open to him, he does so of his own volition. Perhaps his father and elder brothers were miners before him. Leaving aside any sentimental talk of tradition, the real meaning of this is that he will have had an excellent chance of learning the dangers of the job. Perhaps he is married with children. If so, he might have done well considering how he was to fill these extra mouths before bringing them into the world. And even the worst paid job nowadays keeps a family from starving; and the Department of Social Security is often amazingly generous with the taxpayers' money. Anyone who goes down a coal mine does so either because he is stupid, or because he prefers the present satisfactions that the extra money can buy to his continued health in the future. If he goes down for the money, the only difference between him and a smoker is that the smoker combines his pleasure and danger in a single act; and he keeps them distinct. I have listened to much invective against the miners. But I have never heard them called sinners by mere virtue of their occupation. Yet, if to smoke be a sin on the grounds of its unnaturalness, so equally must digging coal be one.

XIII Smoking, Sin and Toleration

This is my answer to the first part of our main question, then - that smoking, in whatever light we care to regard it, is just not sinful. Even, however, if it were - even if it were shown as plainly against Scripture and nature as throat cutting, and the smoker unquestionably doomed to the lake of black fire - my answer to the second part of that main question would remain unaltered. Ambrose and many of the Church Fathers, together with theologians of nearly every Christian

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sect since, have asserted that to tolerate sin is to partake of sin. That this is not so, however, is as necessary a consequence of our two minimal assumptions given above as those by which we prove our own existence. To see this, we return to those assumptions; and, from them, we derive two further secondary principles.

The first of these is that the human will is free. Now, there is no reason in itself to doubt that every event is predetermined, and every soul marked out from the beginning of time for salvation or damnation. But, most plainly, it contradicts our first assumption, of a benevolent God. To see this, suppose I were to train a child of mine to love starting fires, to love the act of kindling flame more than anything else in the world. Suppose then I were to hand him a box of matches and lock him into a fuel store. I could, perhaps, blame what remained of him for the ensuing explosion - just as God could damn a murderer, having been knowingly the first cause of the murder, and the murderer himself just the final link in the chain of causation. My determining influence on the child's actions must be infinitely smaller than that of God on the murderer, yet who would call me a just or loving father, except from fear of offending me? To generalise from this, careless mistakes aside, there is no action whatever we can call sinful where there is no voluntary participation. We laugh at Xerxes, who had the Hellespont scourged for washing his bridge away. Are we to say God is equally childish and arbitrary?

Certainly, taking the will as free brings its own problems. It may save the notion of Divine Benevolence, but only, it seems, by compromising that omniscience which is implicit in the notion of Divine Supremacy. Either God knew, long before He created the universe, that a certain murder would take place, or He did not. If He did know, then all our talk of free will is so much more *flatus uocis*. As with the child and matches, when I see that something will happen, there is always an element of contingency about its happening. When God, in His omniscience, foresees an event, it becomes inevitable. To say otherwise is to state a contradiction. According to Boethius, this is not a real problem. In his view, God is an atemporal being. We exist in time, and are aware of a past and future. God is outside of this continuum; and He therefore can have no foreknowledge, everything occurring in an immediate,

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eternal present.²⁷² This is an ingenious solution, and it may possibly be the real one. But, however we choose to justify it, that the will is free we must believe, or we must abandon the concept of God given above. It is a necessary assumption, following on from our first.

The second question we have already touched, in our discussion of suicide. It concerns what facts God takes into account when delivering His Judgment on each soul - actions or intentions? Our own earthly law, though it sometimes tries its best to do otherwise, can, by and large, judge only according to actions, all else being too uncertain to sway the verdict. To the Divine Court, though, nothing is uncertain. If I were to throw coins at a beggar, hoping without success to break his head, the law of the land would have to regard my action as charitable, if suspect. But, to God, my intent to commit murder - even my precise degree of resolve in the matter - would be perfectly clear, and so a cognisable fact in reaching His Verdict. 'If we have forgotten the Name of our God, and holden up our hands to any strange God: shall not God search it out? For he knoweth the very secrets of the heart.'²⁷³ Hence, we can sin against Divine Law both with our bodies and in our hearts.

Yet, this being said, it seems unreasonable to claim all breaches of that law as being equally serious - a desire to commit genocide, an actual rape, an evil intention bungled and producing only good: all equal grounds for damnation. Go back again to the example of my cutting your throat: if I no more than contemplate the action, I harm only my own prospects of salvation. If I make my intention actual, I also harm another soul, which I may have prevented from excelling in a life of subsequent virtue. To intend is clearly easier than to act; yet, to know myself damned already for the former, what more have I to lose by effecting the latter? The notion is plainly unreasonable, since, so far from deterring, after a very low point, it even encourages sin. Granted, anything is conceivable of God, and there may well be some divine equivalent of the English conspiracy laws. But to suppose this is again an evident contradiction of our first assumption. It seems better to accord putting our sins into an order of gravity, or adopting the

²⁷² Boethius, *De Consolatione Philosophiæ*, Lib. V, cap. 90-105.

²⁷³ Ps., 44:21.

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Roman division of them into venial and mortal. Or we might instead conceive each to carry a given number of points, a sufficient number earned resulting in one's damnation. There can be no certainty on details here, but there can be little dispute whether actual sins are not judged more severely than potential ones.

So we take it that man is a creature capable of freely choosing good or evil, and is judged on how he chooses. Now, in the wild, isolated from others, our opportunities for choosing either are at best limited. Without others round us, our actions must be morally neutral for the most part, only those affecting ourselves and God counting - among these being suicide, masturbation, blasphemy, and the like. Even those sins we could commit in our hearts would be limited by our ignorance of what sins there were to commit. However, it being part of our nature to live in society, this problem seldom faces us. Living in close proximity to others, we find fresh opportunities with each new day for shining in God's eyes, or not. And, in so far as our contact with others increases, so increase our opportunities; and, in so far as it is diminished, so our opportunities are diminished. Which brings us to the logical outcome of our two assumptions. God's full sanction is reserved for those societies alone of which the members can in the greatest degree possible choose good or evil for themselves: any other is a frustration of His Plan.

This outcome stated, we are able to go on and, in descending order of abstraction, derive its practical consequences. We first consider the proper role of government. Now, it does, by its very nature, involve coercion. It exists only by levying taxes, which are had from those who might well have used the money otherwise, to secure grace or damnation. It acts only by interfering with what people do, compelling some things, forbidding others. It is inevitably a hindrance to the free choice of good or evil by its subjects. But, while evidently God abhors the regulating of human action for its own sake, equally He cannot approve the possession of more freedom than is compatible with its own survival. Without some government - perhaps only protecting life and property - such chaos might result that either society would dissolve, or it would fall into the hands of some tyrant, who might promise stability, but deliver somewhat more. If this were so, there would be a Christian case for government. And since both the common sense of mankind and the overwhelming balance of the philosophers believe it so,

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reasoning as theologians, we may provisionally accept that government must exist. Moreover, letting it keep the internal peace, only a fool would deny it the means of foreign defence. Of course, the mode and degree appropriate to each nation differs, and no one kind is suitable to all. But it must be said that spending on armaments may never without sin be greater than is needed for bare defence against aggression. England needs a great navy, and in the modern world, a great air force. Unhappily, we must also have a nuclear deterrent of sorts. But whether we need an army of occupation or defence constantly in Germany seems quite another matter - as is whether we need bases in Cyprus and Hong Kong. In deciding, we must think as strategists and not as theologians; though we require no great depth of learning to see from our own past that having so many distant commitments is to cast a net for troubles.

We come now to the matter of personal conduct, with particular reference to smoking. It ought to be clear from what has already been said that the Christian should stand for the absolute realisable maximum of individual freedom. The only justification of State interference, apart from the protection of others, is the avoidance of collapse into chaos or tyranny. Whether or not smoking might be a threat to others is, as I said at the beginning, a matter which falls outside the scope of this present study. But, as it affects the soul of the smoker, there is no case for control. To be sure, increasing taxes on tobacco products would, in at least some measure, diminish consumption of them. Restricting advertising, it is sometimes argued, might have the same effect. Such measures might well cause many of those inclined to smoking either to think again, or not be reminded so forcibly or often of their inclination. Desiring to sin - always, of course, assuming the sinfulness of smoking - yet not actively sinning, they might avoid some of the pain decreed by God as their punishment. But holding people from evil holds them also from good. No longer are they allowed to confront their sinful longings for cigarettes, to fight them, and overcome them by act of will and piety alone, so gaining salvation. Directed with skill and effort, the law might vastly diminish smoking; but the resulting virtue would like that of a chaste eunuch - derived not from conquest of temptation, but from its absence. Without any overriding excuse of the public order, for any government to try encouraging or prohibiting various kinds of private conduct, is to frustrate the whole purpose of society - which is to be the stage on which

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we act under the watchful eye of God.²⁷⁴

XIV The Evil of Moral Authoritarianism

Moral authoritarianism is far worse than any amount of tobacco product advertising. The authoritarian will be held responsible for the damnation of any souls on account of his having denied their right to choose good of their own accord, desire to sin overcome. The advertiser and his accomplices will find the path to Heaven much smoother. By offering temptation, they provoke choice. Therefore, they may cause the salvation of many who would otherwise have let themselves fall into Hell for lack of positive virtue.

Considered only in themselves, restrictions on smoking are bad. In this country, they are bad also on account of the means by which they have largely been imposed. Most people, if asked what it is that distinguishes a free society from tyranny, will perhaps think first of democracy. As modes of government go, this is a very fine one. But it is not the fundamental point of difference. Freedom relies above all else on the concept of what some call bourgeois legality and others the rule of law. Everyone who is not completely besotted by its power, knows that the State is a frighteningly dangerous institution. It may be a very necessary one. Tolerating its existence may be the only means available to us of seeing off or keeping at bay those other smaller dangers which threaten us. But it is useful only so far as it is kept within close restraints. In all dealings with its subjects, it must be forced to act in strict accordance with certain general rules of conduct, clearly stated in advance. These must apply equally to all citizens. Any dispute on either side as to their meaning must be resolved before independent and impartial courts of law. Where restrictions on smoking are concerned, this principle has been repeatedly flouted.

Twenty years ago, the Wilson Government decided that something had to be done about

²⁷⁴ "Human law does not prohibit every vice from which virtuous men abstain, but only the graver vices ... [which] ... unless prohibited would make it impossible for human society to endure", Aquinas, *Summa Theologiae*, I-II, 96, 2. In isolation, this might be taken as stark dissent from the position of Ambrose. In many ways, indeed, Aquinas deserves a high place in the history of libertarian thought. But, in spite of this, he was also a Catholic theologian of the thirteenth century; and, though he stood firmly against that insane bigotry which tears societies apart, he did not oppose intolerance in itself. On this point, see *ibid.*, II-II, 8 & 10.

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smoking. The first undeniable correlations with disease were being announced; and a government which interfered in everything else saw no principled objection to interfering with the tobacco industry. But it had no time for making laws. In the first place, the Parliamentary timetable was already full to overflowing. Making laws on one thing meant not making laws on something else. In the second, there was no consensus of opinion, either in the country as a whole, or, at that time, in the Labour Party, for anti-smoking legislation not to be time-wastingly controversial. And so, it resorted to threats. Kenneth Robinson, the Minister of Health, proudly recalls how he called the representatives of the leading companies to discussions with him, and bullied them into a “voluntary agreement”. “There was always a slight hint that the government would legislate” he says, “a hint of blackmail in the background. I used it progressively as the talks went on and on. I used to throw up my hands and say, ‘Gentlemen, if you can’t agree, you leave me no alternative’.”²⁷⁵ From then until now, this has been the chosen method of restricting the promotion of tobacco products.

To say “Do as I tell you, or I will consider making a law to compel you” is the same as saying “Do as I tell you”. In constitutional theory, no State official in this country has any more authority than is prescribed by law; and disputes over the use of that authority are referable if not to the normal courts of law, then certainly to various administrative tribunals which usually follow a legalistic procedure. Ministerial “blackmail” is a perfect means of escaping these burdensome restraints. On paper, they remain as formidable as ever they were. In reality, the principles of judicial review become as vital to the governing of this country as the principles of heraldry. The way is opened to omnipotent government, and the destruction of freedom.

Before moving on to a general conclusion, there are two clarifications needed, for the avoidance of misunderstanding.

First, to say that people should be left to go to Heaven or Hell by whatever means they see fit is not to show any lack of concern for them. Just as no libertarian wishes to see them smoking

²⁷⁵ Narrated in *Smoke Ring: The Politics of Tobacco*, Peter Taylor, The Bodley Head, London, 1984, p. 83.

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themselves into illness or an early grave, so no Christian can fail to worry about what may lie in wait for them beyond the grave. That in neither instance is coercion the required answer is no reason to stop caring. In both, the degree of caring is limited only by the requirement that we respect the autonomy of others, and by the normal rules of good taste. To see this, imagine that I, believing in the dangers - whatever these might be - of smoking, were confronted by a smoker. No one likes being pestered by proselytising strangers, as anyone who has been stopped in Central London by Moonies or Iranian refugees will readily admit. The chances of someone's being more than annoyed by such an intrusion are so generally low that it would hardly be worth the effort of beginning a lecture on the evils of tobacco. A total stranger, then, I would leave alone, other than, perhaps, to ask him to put his cigarette out if we were in an enclosed space, or whether he minded my opening a window to disperse the smoke. Someone I knew rather better I might, with sniffs and sour looks, let know what I felt. With a closer friend I might feel rather bolder. With a very close friend or relation - especially one actually suffering from what I had reason to believe an illness caused or worsened by smoking - there would be no restraint. I might beg him to put the cigarette out. I might try shaming him to put it out. I might force on his attention the various costs of smoking. I would do everything short of snatching the cigarette out of his mouth and putting it out myself. There is no contradiction between concern for others and respect for them, so long as each feeling is kept within its proper bounds.

Second, just because a law is unnecessary, or harmful, is not normally sufficient reason for ostentatiously breaking it - nor for trying to bring down whatever government may have imposed it. Every government in history has made or enforced some laws which might be said to have failed the test set for them above. Our own statute book is already blemished. Effective measures to curb smoking would be a scandalous blemish on it. They would be arguably superfluous to the protection of others. In theological terms, they would be evil. Nor, believing them improper beyond all common doubt, would there be any strict obligation to obey such

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commands. We should be free in conscience to ignore them as suited our private pleasure.²⁷⁶ But to say aloud to everyone that a bad law may rightly be broken is something else entirely. To make a cult of civil disobedience - as a whole section of our political class appears to have done - is often only slightly less than preaching rebellion. It opens the way to a contempt of law in general, and by those least able to tell what is bad from what merely inconvenient. This is not to condemn all resistance - certainly not in cases of open tyranny. But, recalling what its effects most usually are, it remains that, whatever their deeds or policy, active resistance to the authorities should normally be a last resort. This is obviously true in England, where, despite a century of increasing misgovernment, we can still call our laws and institutions on the whole sound, and can still agree to accept specific imperfections pending their reform. It applies with equal force, however, in the case of foreign countries. For, on the principle stated and explained above, in this less than perfect world to claim the Divine Sanction, a society need only enjoy the greatest degree of freedom possible, whatever more of it could be thought desirable. And so, to any reasonable man who may consider the overthrow of a bad government, the proper question is not - as the modern intellectual might occasionally pause to ask - whether he really will be assaulting something unspeakably evil, but to what extent his acting can result in any better state of affairs.²⁷⁷

XV Conclusions

This, then, is what can be said about smoking. It is not an addiction destructive of will and reason. It may or may not even have certain short-term therapeutic merits. In so far as it is otherwise an unnatural act, it is no worse than coal mining. On Christian grounds, there is nothing to be said against it. It is an indifferent activity. On the matter of legislative control,

²⁷⁶ This is no revolutionary assertion of rights. Without going through the constitutional documents of British and American history, I turn again to Aquinas: "Laws may for two reasons be unjust. First, they may be contrary to the good of mankind ... either with regard to their end - as when a ruler imposes laws which are burdensome and designed not for the common good, but his own rapacity or vanity - or with regard to their maker - if, for example, he should go beyond his proper powers - or with regard to their form, if, though intended for the common good, their burdens should be inequitably distributed. Such laws come closer to violence than to true law ... They do not, therefore, oblige in conscience, except perhaps for the avoidance of scandal or disorder", *Summa Theologiae*, I-II, 96, 4.

²⁷⁷ "The overthrow of such governments is not strictly sedition, unless perhaps when accompanied by such disorder that the community suffers greater harm than from the tyrannical government", *ibid.*, II-II, 42, 2.

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those Christian advocates who are not merely putting a religious gloss on their secular views are guilty of a fundamental misconception - that it is the duty of government to make people good. It is the duty of government to do no such thing. It is instead to maintain an orderly environment in which we are able to do such good as we may choose of our own free will. If a Christian has any duty to become involved in politics, the politics appropriate to his faith are those of what used to be called liberalism, and which are today found in diluted form in the Conservative Party. If he has any duty to take a position on smoking, that position is surely one strongly opposed to any restrictions which have not as their end the protection of others. John Stuart Mill was not a Christian, but his words on liberty, properly construed, are fully in accord with Christianity. Though subject ultimately to God, where secular relationships are concerned, "[o]ver himself, over his own body and mind, the individual is sovereign".

